IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 21-0732

(An Appeal from Cabell County Civil Action No. 18-C-240)

Administrator Larry Crawford, individually and in his official capacity; Captain Carl Aldridge, individually and in his official capacity; C.O. Paul Diamond, individually and in his official capacity; C.O. Don Vance, individually and in his official capacity; C.O. David Rodes, individually and in his official capacity; C.O. Joshua Scarberry, individually and in his official capacity; and The West Virginia Regional Jail and Correctional Facility Authority, an agency of the State of West Virginia

Defendants Below, Petitioners

vs. **No. 21-0732**

Michael A. McDonald,

Plaintiff Below, Respondent.

PETITIONERS' BRIEF

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ASSIGNMENTS OF ERROR

The Circuit Court erred when it denied the Petitioners' Motion for Summary Judgment on Michael McDonald's tort claims and claims asserted pursuant to 42 U.S.C. § 1983 for alleged excessive use of force and failure to provide medical care to a pretrial detainee under the Fourteenth Amendment to the United States Constitution because the Petitioners are entitled to qualified immunity as a matter of law on all claims.

STATEMENT OF THE CASE

I. Procedural History

Respondent, Michael McDonald, Plaintiff below, filed his Complaint in the Circuit Court of Cabell County on May 2, 2018. Joint Appendix ("JA") 0546. The Complaint alleges numerous tort claims against the West Virginia Regional Jail and Correctional Facility Authority ("WVRJCFA")[1] and several of its officers and employees, as well as constitutional claims against the individuals. JA0022-0032. Mr. McDonald alleges that he was subjected to excessive use of force while a pretrial detainee at Western Regional Jail ("WRJ") in Barboursville, Cabell County, West Virginia. JA0022-0023.

The WVRJCFA, Carl Aldridge, Cpl. Paul Diamond, C.O. Fleming, and Larry Crawford answered the Complaint, denying all allegations. JA0033-0062. On August 27, 2019, Mr. McDonald filed a motion seeking leave to amend his Complaint and identify C.O. David Rodes, C.O. Joshua Scarberry and C.O. Don Vance as additional defendants. JA0063-0065, 0546. On

[1] Effective July 1, 2018, the State agency formerly designated as the West Virginia Regional Jail and Correctional Facility Authority was consolidated with two other agencies and is now known as the West Virginia Division of Corrections and Rehabilitation. W.Va. Code §15A-3-2. For purposes of this appeal, the Petitioners will use the name of the agency as it existed at the time the initial Complaint was filed, to remain consistent with the practice before the lower court.

October 15, 2019, an Agreed Order was entered which granted Mr. McDonald's motion to add the three new parties. JA0066-0067. The Agreed Order additionally dismissed C.O. Wallace and C.O. Fleming, with prejudice, and directed that Wallace and Fleming "shall not be parties in the Amended Complaint." JA0066. The Amended Complaint alleges the same tort and constitutional claims as the initial Complaint. JA0068-0079. The Petitioners answered the Amended Complaint, denying all allegations. JA0080-0091.

Petitioners filed a Motion for Summary Judgment and Memorandum in support on April 8, 2021, arguing that Mr. McDonald's claims are barred by the doctrine of qualified immunity. JA0156-0265, 0547. Mr. McDonald filed a response in opposition to the motion (JA0266-0452), and the Petitioners filed a reply (JA0453-0460). A hearing was held on the motion for summary judgment on June 30, 2021. JA0502-0545. Both Petitioners and Mr. McDonald submitted proposed orders to the Circuit Court with proposed findings of fact and conclusions of law. JA0461-0472, 0473-0494. The Circuit Court entered an Order denying the Motion for Summary Judgment on September 2, 2021. JA0001-0021. The Court's Order substantially included language from the proposed order that had been submitted on behalf of Mr. McDonald, which includes various inaccurate statements of both fact and law.

This is an interlocutory appeal from the September 2, 2021, Order of the Honorable Christopher D. Chiles, Judge of the Circuit Court of Cabell County, denying the Petitioners' Motion for Summary Judgment on the grounds of qualified immunity. JA0001-0021. The Petitioners seek a ruling from this Court REVERSING the decision of the lower court and REMANDING this case with instructions to enter judgment as a matter of law in favor of the Petitioners on all claims.

II. Statement of the Facts

This litigation arises from allegations by Michael McDonald of excessive use of force by Correctional Officers Paul Diamond, Don Vance, David Rodes, and Joshua Scarberry while he was incarcerated at WRJ. During the times relevant to his Amended Complaint, Mr. McDonald was a pretrial detainee being held at WRJ, which was operated by the WVRJCFA.

Just after midnight on June 27, 2016, after using methamphetamine during the previous day, Michael McDonald was arrested by the Putnam County Sheriff's Office on an outstanding capias warrant. JA0163-0166, 0186. Mr. McDonald described being "pretty lost" for a period of about six months prior to his arrest. JA0167-0168. During this period, Mr. McDonald was a heavy user of methamphetamines and was feeling "emotionally unstable." JA0166-0168. He described methamphetamine as a "spiritual drug" for him that "opens up doors and gates." JA0168. It was in this state, high on methamphetamine, emotionally unstable, and relishing the "spiritual" high of his drug use, that Mr. McDonald arrived at WRJ at 12:47 a.m. on June 27, 2016. JA0186.

Upon his arrival, Mr. McDonald was taken to the booking area where he was processed. JA0186. Night Shift Supervisor Cpl. Paul Diamond was present with Mr. McDonald through the booking process and noticed that Mr. McDonald was fidgeting, was erratic in his conversation, and was acting unpredictably. JA0186, 0188. Based on these behaviors, Cpl. Diamond suspected that Mr. McDonald was under the influence of drugs. JA0188-0189.

Once Mr. McDonald was medically cleared for admittance to the facility, Cpl. Diamond directed C.O. II David Rodes to place Mr. McDonald into holding cell 5, a few feet away in the booking area, as there were multiple new arrestees on the benches awaiting processing. JA0186, 0195. Officer Rodes permitted Mr. McDonald to get a mattress, then Mr. McDonald refused to go into the cell as instructed. JA0186, 0195. Cpl. Diamond and other officers continued to direct Mr. McDonald to go into the cell multiple times, and Mr. McDonald continued to refuse. JA0186,

0189-0190, 0194-0195. Mr. McDonald admits that he refused to enter the cell when instructed, and verbalized his refusal to Cpl. Diamond. JA0170-0171. Mr. McDonald agrees that he refused Cpl. Diamond's order to go into the holding cell "two or three times." JA0172-0173.

Importantly, Mr. McDonald was not in restraints at the time he refused the order. JA0174. Additionally, when he refused the order, he dropped a foam mattress he was carrying and assumed an aggressive posture toward the officers. JA0191. Cpl. Diamond perceived Mr. McDonald's refusal to comply with direct orders as a possible threat to officer safety. JA0190. Cpl. Diamond had a can of Oleoresin Capsicum (O.C.) foam. Prior to using the O.C., Cpl. Diamond specifically told Mr. McDonald that he was going to spray him if he did not comply. JA0191. Mr. McDonald acknowledged that, prior to deploying the O.C., Cpl. Diamond held the can up as a warning that further refusal could result in being sprayed. JA0173. Mr. McDonald continued to refuse. JA0191. Cpl. Diamond deployed a 0.5 second burst of O.C. foam to Mr. McDonald's facial area. JA0186. Cpl. Diamond's use of O.C. was a reaction to Mr. McDonald's aggressive stance and refusing to follow orders. JA0190-0191. Cpl. Diamond was following the use of force continuum and sought to gain control of the situation using the least amount of force necessary. JA0190-0191.

The incident was captured on WRJ video, which includes audio. JA0197.[2] Video evidence of Mr. McDonald's booking and the spraying of O.C. confirms that he was not only erratic during the booking process, but refused the order to go into the holding cell. JA0197. The video and accompanying audio also confirm that the officers present, including Cpl. Diamond, Officer Rodes, and C.O. II Joshua Scarberry, attempted to talk Mr. McDonald into going into the cell prior

[2] Mr. McDonald makes his first appearance in the booking area at 12:52 a.m. At 1:07 a.m. he is escorted to the holding cell and instructed to go in. At 1:07:49 Mr. McDonald can be heard refusing to go into the cell. From 1:07:49 though 1:08:59, Mr. McDonald continues refusing direct orders from multiple officers to go into the cell. Cpl. Diamond can be heard warning Mr. McDonald that he will be sprayed with O.C. if he continues to refuse. At 1:09 a.m., Cpl. Diamond deploys a .5 second burst of O.C.

to the O.C. being deployed. JA0197. Cpl. Diamond gave Mr. McDonald fair warning that if he continued to refuse the orders, he would be sprayed. JA0197. Despite these attempts to gain compliance without use of force, Mr. McDonald continued to refuse to comply. JA0197.

After the O.C. was deployed, Mr. McDonald dropped to the ground and was placed in restraints by the officers. JA0186. Mr. McDonald was escorted to the booking shower area for fresh water decontamination by washing his face with "copious amounts of cool water." JA0186. Mr. McDonald confirmed his immediate decontamination, stating that he was quickly taken to get the O.C. washed off of his face with water. JA0175. Mr. McDonald was then checked by a nurse and cleared. JA0186. Next, Mr. McDonald was escorted to an outside recreation yard to further decontaminate with fresh air. JA0186. Mr. McDonald confirmed that he was taken to the recreation yard as part of the decontamination process. JA0175.

While out on the yard, Mr. McDonald "allowed his pants and underwear to fall to his ankles exposing his genitals, and was repeatedly hitting his head on the recreation yard door intentionally, while making lewd gestures." JA0186. Cpl. Diamond described Mr. McDonald's behavior while on the recreation yard as "erratic behavior." JA0192. Cpl. Diamond observed Mr. McDonald fondling his rectal area with his hands. JA0192. Mr. McDonald was handcuffed behind his back, and he bent over to expose his rectum and manipulated it with his fingers. JA0192. Mr. McDonald was banging his head off the door. JA0192. Mr. McDonald was shouting and yelling, "but nothing he was saying was making sense. He was just talking out of his head." JA0192. Mr. McDonald confirmed the behavior that Cpl. Diamond described. Mr. McDonald stated that while on the recreation yard, some of the O.C. spray that had not completely washed off ran down his body and began to burn. JA0175-0176. He admits that in reacting to this, he had pulled down his pants and made lewd hand gestures with his genitals, and was giving the officers "something to

look at." JA0176-0177. Mr. McDonald also admits that he was banging his head on the door. JA0176. Mr. McDonald's conduct was contemporaneously documented on a watch log as it was occurring. JA0186, JA0198. The watch log confirms that Mr. McDonald was "walking with pants pulled down" and was "banging" his head on the door. JA0198.

Observing Mr. McDonald's behavior, Cpl. Diamond made the decision to place Mr. McDonald in a restraint chair "to prevent Inmate McDonald from harming himself." JA0186. Cpl. Diamond described "an immediate need to get him secure for his safety to prevent self-harm" due to Mr. McDonald banging his head. JA0193. Mr. McDonald was initially placed in the restraint chair at 1:55 a.m. on June 27, 2016, by Cpl. Diamond and Officer Rodes. JA0193, 0198.

After Mr. McDonald was secured in the chair and transported to an interview room, the restraints were checked by a nurse. JA0186, 0193. Corrections staff continued to monitor Mr. McDonald and maintain a watch log. JA0186, 0198. After the two-hour O.C. watch was concluded, Mr. McDonald continued to act erratically, so he remained in the restraint chair with corrections staff maintaining a watch log and medical staff conducting checks every 30 minutes and logging those separately. JA0186, 0199-0210. The Offender Watch Log indicates that at 3:10 a.m. on June 27, 2016, Mr. McDonald was cleared from O.C. watch, but "remains in ERC [Emergency Restraint Chair] due to erratic behavior." JA0199. Throughout his time in the restraint chair, Mr. McDonald was continuously monitored by both corrections officers and health care workers. JA0199-0210. His legs and arms were freed at various times and he was allowed to stretch, and he was provided food and water. JA0199-0210. At 3:13 a.m., Mr. McDonald was "making threats to staff." JA0199. At 4:05 a.m., Cpl. Diamond let Mr. McDonald stretch his arms. JA0199. At 5:45 a.m., Mr. McDonald was "yelling and screaming." JA0199. When Cpl. Diamond's shift ended, he passed the information on to the Day Shift Supervisor. JA0186, 0212.

Mr. McDonald continued to behave erratically over the next twenty-one (21) hours while restrained. He acted out by screaming, loudly singing gospel songs, attempting to escape from the chair, and threating to kill officers. JA0199-0207.[3] The watch log also documents the various times Mr. McDonald was partially released and allowed to stretch and use the bathroom. JA0199-0207. Mr. McDonald was provided food, water, and medical care the entire time he was in the chair. JA0199-0207.[4] In addition, records from PrimeCare Medical, Inc., the healthcare provider at WRJ, indicate that Mr. McDonald was checked on by healthcare professionals no less than thirty-three (33) times while he was in the restraint chair. JA0208-0210. Mr. McDonald was offered water nearly every time he was checked on by PrimeCare nurses and the use of bed pans to allow Mr. McDonald to relieve himself were offered on at least twelve (12) checks, in addition to the times the watch log indicates Mr. McDonald was taken to the restroom by WRJ officers. JA0208-0210.

Mr. McDonald's testimony corroborates that he was being disruptive. JA0180-0181. He was loudly singing religious songs and was having a "very spiritual experience" which he described as "fighting evil off." JA0180-0182. Mr. McDonald admitted that, while in the chair, he continued singing religious songs "a lot of the time" and the singing was "mixed up with some hollering" at the officers. JA0184-0185. After Mr. McDonald was determined to no longer be a

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[3] Some examples from the documentation include "Due to acting out could not release a limb" (JA0200), "Attempted [to] open door with his feet" (JA0202), "Inmate kicked the door and said he was going to fight" (JA0203), "trying to break strap to chair" (JA0203), "Threaten to kill officer" (JA0204), "Sitting in ERC, trying to loosen belts" (JA0206), "I[nmate] screaming [and] trying to flip the chair" (JA0206).

[4] Some examples from the watch log include "Nurse gives water to McDonald" (JA0201), "Eating and checked by nurse" JA0201, "Arms were released and stretched" (JA0201), "Cpl. Ball takes off leg restraints" (JA0201), "Verbal exchange given water and [illegible]" (JA0202), "Lets arms out" (JA0202), "Eating chow" (JA0203), "Checked vitals...Circulation in all extremities good" (JA0205), "Cpl. Paul Diamond take inmate to restroom" (JA0205), and "Placed back in chair given 2 cups of water" (JA0205).

danger to either himself, health care workers, or officers, he was released. At 5:15 a.m. on June 28, 2016, "Cpl. Diamond removed i[nmate] from chair to be showered out." JA0207.

At the time of the alleged events, Larry Crawford was the Administrator at WRJ. There is no evidence in the record that Crawford was present during the events in question or that he played any role in those events. At the time of the alleged events, Carl Aldridge was a Chief Correctional Officer at WRJ. JA0226. On the night in question, Aldridge was not on duty. JA0225.

Officers Don Vance, David Rodes, and Joshua Scarberry were each present during portions of the alleged events, but Mr. McDonald could not identify any conduct by them individually that would warrant their inclusion as parties. JA0178-0179. While other officers were present when Mr. McDonald was sprayed by O.C., the spraying was done solely by Cpl. Diamond. Further, while Officer Rodes is identified as having assisted in placing Mr. McDonald in the restraint chair, there is no evidence that Officer Rodes played any role in making that decision. To the contrary, the decision to place Mr. McDonald in the restraint chair was made initially by Cpl. Diamond. JA0300. The record shows that it was in the discretion of the supervising officer, based upon behavior and input from medical staff, how long the inmate would remain in the restraint chair. JA0313-0314. Initially, that was Cpl. Diamond. However, at a certain point in time, Cpl. Diamond's shift ended and another supervisor came on shift. JA0313. There is no evidence that Officers Vance, Rodes, or Scarberry were ever in a position of determining when it was appropriate to release Mr. McDonald from the restraint chair, and Mr. McDonald has not produced any documents or witnesses implicating them in any wrongful conduct.

SUMMARY OF ARGUMENT

The circuit court committed reversible error when it denied the Petitioners' Motion for Summary Judgment on Mr. McDonald's claims, because they are each entitled to qualified

immunity as a matter of law. The circuit court's reasoning for denying summary judgment on the defense of qualified immunity is erroneous. The circuit court's order discusses the Petitioners collectively without providing any meaningful analysis as to the conduct of each individual that could arguably support a claim against each. As a result, the court's reasoning is vague and conclusory, and is not supported by the record. When evaluated individually in the appropriate context, each of the Petitioners is entitled to summary judgment on all claims based on qualified immunity afforded them under West Virginia and federal law.

Additionally, the circuit court's order contains several inaccurate statements that are either (1) contrary to the factual record presented below or (2) not factually supported by the record below. The combined effect of these inaccurate statements and unsupported assertions results in an analysis of the qualified immunity defense that is fatally flawed.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument may be unnecessary pursuant to W.Va. R. App. P. 18(a), because the dispositive issue, qualified immunity available to the State of West Virginia, has been authoritatively decided. However, in the Court's discretion, oral argument may nevertheless be appropriate under W.Va. R. App. P. 19(a) because questions of qualified immunity often involve case-specific analysis that may be aided by Rule 19 argument. Specifically, oral argument may be appropriate under Rule 19(a) because the question of qualified immunity is an issue of settled law in West Virginia[5], because the decision below is not supported by sufficient evidence in the record, and because this appeal involves a narrow issue of law, specifically, the application of the qualified immunity defense. Because qualified immunity is an issue of settled law in West Virginia, this case is likely appropriate for a memorandum decision.

[5] Particularly, *W. Va. Reg'l Jail and Corr. Facility Auth. v. A.B.*, 234 W.Va. 492, 766 S.E.2d 751 (2014).

ARGUMENT

I. STANDARD OF REVIEW

This Court has specifically recognized that "[a] circuit court's denial of summary judgment that is predicated on qualified immunity is an interlocutory ruling which is subject to immediate appeal under the 'collateral order' doctrine." Syl. Pt. 2, *Robinson v. Pack*, 223 W.Va. 828, 679 S.E.2d 660 (2009). Further, this Court should apply a *de novo* standard of review in an interlocutory appeal of a denial of a motion for summary judgment when such a motion is properly before this Court. Syl. Pt. 1, *Findley v. State Farm Mut. Aut. Ins. Co.*, 213 W.Va. 80, 576 S.E.2d 807 (2002); Syl. pt. 2, *City of St. Albans v. Botkins*, 228 W.Va. 393, 719 S.E.2d 863 (2011).

Summary judgment should be granted "when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." Syl. Pt. 3, *Aetna Casualty & Surety Co. v. Federal Ins. Co. of New York*, 148 W.Va. 160, 133 S.E.2d 770 (1963); W.Va. R. Civ. P. 56(c). In determining whether to grant summary judgment, the Court is not to "weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Painter v. Peavy*, 192 W.Va. 189, 192, 451 S.E.2d 755, 758 (1994), quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). Although the facts and inferences must be viewed in a light most favorable to the non-moving party, that party must produce "concrete" evidence which would allow a reasonable finder of fact to return a verdict in its favor. *Id.*, 192 W.Va. at 193, 451 S.E.2d at 759.

Qualified immunity provides more than immunity from damages, but also affords immunity from the burdens of litigation itself. *See J.H. v. W.Va. Div. of Rehab. Servs.*, 224 W.Va. 147, 157, 680 S.E.2d 392, 402 n.12 (2009). In order to give effect to the purpose behind qualified

immunity, a defendant asserting a proper qualified immunity defense is entitled to dismissal at the earliest possible point in the litigation. *Id.* Because there is no dispute over the foundational or historical facts in the instant matter bearing upon the issue of qualified immunity, the applicability of qualified immunity to Mr. McDonald's claims is a question of law for the Court to determine. *City of St. Albans v. Botkins*, 228 W.Va. 393, 400, 719 S.E.2d 863, 870 (2011), *citing Hutchison v. City of Huntington*, 198 W.Va. 139, 149, 479 S.E.2d 649, 659 (1996).

II. THE CIRCUIT COURT COMMITTED ERROR IN RELYING UPON ASSERTIONS OF FACT UNSUPPORTED IN THE RECORD.

This Court, in reaffirming the continued viability and importance of the defense of qualified immunity, has set forth a clear mandate that courts denying this defense at the summary judgment phase must sufficiently support their decisions. Specifically,

> A circuit court's order denying summary judgment on qualified immunity grounds on the basis of disputed issues of material fact must contain sufficient detail to permit meaningful appellate review. In particular, the court must identify those material facts which are disputed by competent evidence and must provide a description of the competing evidence or inferences therefrom giving rise to the dispute which preclude summary judgment.

Syl. pt. 4, *The West Virginia DHHR v. Payne*, 231 W.Va. 563, 746 S.E.2d 554 (2013). In its Order of September 2, 2021, the circuit court failed to clearly identify material facts which are disputed by competent evidence, and failed to provide a description of the competing evidence or inferences which allegedly give rise to a dispute precluding summary judgment, as required by *Payne*, *supra.* This requirement is crucial to appellate review of the lower court's decision because:

> The ultimate determination of whether qualified or statutory immunity bars a civil action is one of law for the court to determine. Therefore, unless there is a bona fide dispute as to the foundational or historical facts that underlie the immunity determination, the ultimate questions of statutory or qualified immunity are ripe for summary disposition.

Syl. pt. 5, *Payne*, *quoting* Syl. pt. 1, *Hutchison v. City of Huntington*, 198 W.Va. 139, 479 S.E.2d 649 (1996). Because of the importance of the qualified immunity defense to governmental entities and employees, *Payne* requires a court denying the defense based upon disputed factual issues to identify those issues in detail, so that such a denial can be meaningfully reviewed on an interlocutory basis. Syl. pt. 2, *Payne*; *J.H. v. W.Va. Div. of Rehab. Servs.*, 224 W.Va. 147, 157, 680 S.E.2d 392, 402 n.12 (2009) (a defendant asserting a proper qualified immunity defense is entitled to dismissal at the earliest possible point in the litigation). *Payne* requires that the Court's Order denying summary judgment based upon qualified immunity include such a description; or, if no such competent evidence of disputed facts is found in the record, summary judgment should be entered in favor of the Petitioners based upon qualified immunity. *See J.H. v. W.Va. Div. of Rehab. Servs.*, 224 W.Va. 147, 157, 680 S.E.2d 392, 402 n.12 (2009).

In this case, relying heavily upon Mr. McDonald's proposed language in its Order ultimately adopted, the circuit court's order contains numerous factual assertions that are either contrary to the record presented below or are not factually supported by the record presented below. To the extent that the circuit court relied on any of these findings, its decision constitutes clear error and is not supported by the record.[6]

Paragraph 2 of the Order incorrectly states that it is "undisputed individual Defendants strapped Plaintiff to a restraint chair where he languished for approximately twenty-eight (28) hours" JA0002. To the extent that the phrase "individual Defendants" refers to anyone other than Diamond and Rodes, this statement is disputed. JA0193, 0198. Further, the term "languished" is

[6] The circuit court erroneously included C.O. Wallace and C.O. Fleming in the style of its Order, as well as in paragraph 1 of the order. JA0001-0002.This is clear error because these individuals were dismissed with prejudice by Agreed Order entered on October 15, 2019, including the direction that they "shall not be parties in the Amended Complaint." JA0066-0067.

disputed based on the watch log and medical log. JA0199-0210. Additionally, there was no testimony or other competent evidence presented to the court below that Mr. McDonald was "denied access to the bathroom, was rarely fed, if at all, and rarely supplied water and urinated and regurgitated on himself," and these statements are contrary to the record, which shows that Mr. McDonald was provided bathroom access as well as food and water.[7]

Paragraph 5 states that "Defendants argue Plaintiff testified he deliberately disrobed to give the officers 'a show.' However, Plaintiff confirmed he said so jokingly since his clothes were already falling off due to being fully restrained in handcuffs." JA0003. There was no evidence presented to the court that Mr. McDonald made any statement "jokingly" as stated in Paragraph 5.

Paragraph 6 inaccurately represents that "As stated in Defendants' Motion, Plaintiff languished in the 'devil's chair' for twenty-eight (28) hours – eighteen (18) hours longer than what the maximum is allowed by the chair's manufacturer, national standards and WVRJA rules and regulations dictate." JA0004. The "Defendants' Motion" certainly did not make that assertion. Further, there is no support for the use of the term "devil's chair." The only reference to "devil's chair" in the record is Cpl. Diamond stating "I have never heard it called that." JA0301. Additionally, the court's task on a summary judgment motion is not to "weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Painter v. Peavy*, 192 W.Va. 189, 192, 451 S.E.2d 755, 758 (1994) (additional citation omitted). This paragraph appears to go beyond that scope and appears to make a factual finding based on arguments presented by Mr. McDonald. Such findings would be inappropriate at the summary judgment stage where facts are disputed by the Petitioners.[8]

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[7] There is no evidence in the record presented that Mr. McDonald urinated on himself, defecated on himself, threw up, or regurgitated. Cpl. Diamond was asked about these things and did not recall any of that occurring. JA0301. Mr. McDonald presented no documents or testimony to the contrary.

[8] For example, with respect to the alleged manufacturer instructions, Mr. McDonald provided a single

Continuing with Paragraph 6, it is contrary to the record to say "It is further undisputed Defendants have not provided any evidence which contradicts Plaintiff's assertions he was left in this restraint chair for twenty-eight (28) hours non-stop – all the while allegedly vomiting and urinating on himself." JA0004.[9] There is competent evidence in the record which contradicts any assertion that Mr. McDonald was left in the restraint chair for twenty-eight hours non-stop. JA0199-0210. There is no evidence in the record presented that Mr. McDonald allegedly vomited or urinated on himself.[10] Additional inaccuracies in the court's Order are addressed below in the context of particular arguments to demonstrate how the court's flawed analysis led to an unsupported result that should be reversed by this Court.

III. THE CIRCUIT COURT'S DENIAL OF SUMMARY JUDGMENT TO LARRY CRAWFORD AND CARL ALDRIDGE BASED UPON QUALIFIED IMMUNITY IS BASED UPON AN INCORRECT APPLICATION OF THE LAW.

In West Virginia, qualified immunity is designed to protect public officials from the threat of litigation resulting from difficult decisions. *See, e.g., Clark v. Dunn*, 195 W. Va. 272, 465 S.E.2d

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document to the court purporting to be manufacturer instructions for the restraint chair. JA0325. However, Mr. McDonald did not present the court with any testimony providing any context for how this document is to be interpreted or how it applies. Moreover, it is entirely unclear what is meant by the term "national standards" used in Paragraph 6, as no citation to any source is included.

[9] Paragraph 9 similarly alleges that while restrained, Mr. McDonald was "constantly and consistently ridiculed, embarrassed, laughed at for urinating on himself and mentally abused" and "Plaintiff claims the acts of the Defendants were so hateful and hurtful Plaintiff has sought psychological counseling with Dr. David Frederick of Huntington, West Virginia." JA0005-0006. There is no citation to the record to support these assertions.

[10] Additionally, Paragraph 10 presents a mischaracterization of the position taken by the WVRJCFA, Crawford, and Aldridge in their prior Motion for Judgment on the Pleadings. JA0092-0109. Paragraph 10 states that these parties "took the stance that the individual Defendants' actions/inactions were criminal and outside the scope of their employment at the WRJ." JA0006. This is not correct. The Motion for Judgment on the Pleadings is a distinct motion with a different standard of review, because, for purposes of the motion, the allegations in the Plaintiff's pleading must be taken as true. "A motion for judgment on the pleadings presents a challenge to the legal effect of given facts rather than on proof of the facts themselves." *Copley v. Mingo County Bd. Of Educ.*, 195 W. Va. 480, 466 S.E.2d 139 (1995). It is inaccurate to say that any of the Petitioners have taken the position that any conduct in connection with this case was, in fact, criminal, because the Petitioners have at all times denied the factual assertions alleging wrongful conduct.

374 (1995). In order to sustain a viable claim against a state agency or its employees or officials acting within the scope of their authority sufficient to overcome this immunity, it must be established that the agency employee or official knowingly violated a clearly established law, or acted maliciously, fraudulently, or oppressively. *Parkulo v. W. Va. Bd. of Probation & Parole*, 199 W. Va. 161, 177, 483 S.E.2d 507, 523 (1996). The state and its agencies, officials, and employees are immune from liability for acts or omissions arising out of the exercise of discretion in carrying out their duties, so long as they do not violate any known law or act with malice or bad faith. *Id.*, at Syl. pt. 8. This rule operates even when the "discretionary acts" that are the subject of the complaint were "committed negligently." *Maston v. Wagner*, 781 S.E.2d 936, 948 (W. Va. 2015).

This Court has explained that the doctrine of qualified immunity shields public officers from liability for negligence in the performance of their duties:

> If a public officer, other than a judicial officer, is either authorized or required, in the exercise of his judgment and discretion, to make a decision and to perform acts in the making of that decision, and the decision and acts are within the scope of his duty, authority and jurisdiction, he is not liable for negligence or other error in the making of that decision, at the suit of a private individual claiming to have been damaged thereby.

Syl. pt. 4, in part, *Clark v. Dunn*, 195 W. Va. 272, 465 S.E.2d 374.

Qualified immunity bars a claim of negligence against a State agency "and against an officer of that department acting within the scope of his or her employment, with respect to the discretionary judgments, decisions, and actions of the officer." Syl. pt. 7, *W. Va. Reg'l Jail and Corr. Facility Auth. v. A.B.*, 234 W.Va. 492, 766 S.E.2d 751 (2014), *quoting* Syl. pt. 6, *Clark v. Dunn*, 195 W.Va. 272, 465 S.E.2d 374. In the absence of a showing that discretionary governmental acts violated clearly established laws of which a reasonable person would have known, "both the State and its officials or employees charged with such acts or omissions are immune from liability." Syl. pt. 11, *Id.* Qualified immunity covers the discretionary judgments of

"rank-and-file" employees of a state agency, as well as high level officials. *A.B.*, 766 S.E.2d at 763, *see also* 766 S.E.2d at 763, n.15.

A. THE CIRCUIT COURT ERRED IN CONCLUDING THAT MR. MCDONALD HAS ALLEGED VIOLATION OF CLEARLY ESTABLISHED LAW IN CONNECTION WITH SUPERVISION AND TRAINING.

Mr. McDonald asserts claims against Crawford and Aldridge for negligent supervision and training.[11] The circuit court incorrectly concluded that the various general statements and provisions cited by Mr. McDonald constituted "clearly established law" in connection with supervision and training, and therefore incorrectly denied summary judgment on these claims.

The circuit court correctly found in its order that the first element of qualified immunity is met. Its Order concludes that "all WVRJA employees'/agents' respective actions/inactions could likely be determined to be discretionary." JA0014. This is consistent with this Court's prior determination that "we believe the broad categories of training, supervision, and employee retention...easily fall within the category of discretionary governmental functions." *W. Va. Reg'l Jail and Corr. Facility Auth. v. A.B.*, 232 W. Va. 492, 514 (internal quotation marks omitted). Therefore, the application of qualified immunity is warranted, unless Mr. McDonald shows that Crawford or Aldridge violated clearly established laws regarding employee supervision and training of which a reasonable person would have known. Syl. Pt. 11, *Id.*

Regarding this second step, Mr. McDonald argues that W.Va. Code §31-20-9 is a "clearly established law" which was allegedly violated by Crawford and Aldridge. The circuit court erroneously adopted this conclusion in its Order, stating that "Plaintiff contends the Defendants did not adhere to their duty to provide Plaintiff with a 'safe' environment and did not have 'appropriate staffing and training' at WRJ[.]" JA0015. However, W.Va. Code §31-20-9 does not

[11] Similar claims against Crawford and Aldridge for negligent hiring and retention were dismissed. JA0007.

constitute a clearly established law for qualified immunity purposes because it does not prescribe any specific behavior by Crawford or Aldridge and it does not clearly define any rights. In fact, the statute is not directed to prison officials at all. Instead, it directs the Jail Facilities and Standards Commission to establish standards for the maintenance and operation of county and regional jails, and broadly identifies topics that should be addressed by those standards. JA0015. It does not set forth any standards themselves. Mr. McDonald has not identified any specific standards that would apply to Crawford or Aldridge in connection with supervision and training, and therefore they are entitled to qualified immunity on these claims.

In addition, the circuit court makes reference in its Order to other potential sources of "clearly established law," including unspecified "policies and provisions" and a "Mission Statement." JA0015. Because the "policies and provisions" are not identified or described, it is impossible for this Court to meaningfully review this conclusion and equally impossible for the Petitioners to determine what specifically the court is relying upon here. However, there are no "policies and provisions" in the record below that apply specifically to officer training or supervision. The "Mission Statement" is not contained in the record presented to the court below, and therefore it is error for the court to conclude that any such "Mission Statement" could constitute "clearly established law" in connection with supervision or retention of employees.

According to this Court's precedent, not every law, statute, rule, policy, procedure, or enactment will be considered "clearly established law" for purposes of defeating qualified immunity. A "clearly established" law in this context is one which defines a "clearly established right." *A.B.*, 234 W.Va. 492, 766 S.E.2d 751, 776. A right is considered "'clearly established' when its contours are 'sufficiently clear that a reasonable official would understand that what he is doing violates that right.'" *Id.*, *quoting Hope v. Pelzer*, 536 U.S. 730, 739 (2002) (additional

citation omitted). Critically, sources of law that are too vague or abstract, or that do not establish a right, will not suffice to defeat qualified immunity.

Even if Crawford or Aldridge failed to follow certain internal policies or procedures as generally alleged by Mr. McDonald, they are not "clearly established law" that could defeat qualified immunity unless they grant inmates specific rights. Internal policies relating to officer supervision and training would not meet this test. Indeed, this Court has expressed wariness "of allowing a party to overcome qualified immunity by cherry picking a violation of any internal guideline..." *Crouch v. Gillispie*, 240 W.Va. 229, 237, 809 S.E.2d 699, 707 (2018).

As an example, this Court in *A.B.*, *supra.*, specifically determined that the Prison Rape Elimination Act ("PREA") does not constitute clearly established law because it does not grant prisoners any specific rights. *A.B.*, 766 S.E.2d at 774 (additional citations omitted). As a result, this Court found that neither PREA nor the standards promulgated at its direction provide any basis to defeat qualified immunity under West Virginia law. *Id.*, 766 S.E.2d at 774.

In this matter, the circuit court did not conduct the required analysis to determine whether W.Va. Code §31-20-9 is a "clearly established law" under the standards set forth by this Court in *A.B.* The statute clearly does not meet the test because it is not directed to WVRJCFA officials, it does not set forth any standards, and it does not grant inmates any specific rights. Additionally, the circuit court erred in blindly referring to unspecified "policies and provisions" and an unidentified "Mission Statement" and concluding that they constitute "clearly established law" without even identifying what they are or what they allegedly require. Mr. McDonald has not pointed to any other law establishing that an inmate has any particular "right" associated with any aspect of correctional officer training or supervision. This situation is analogous to the question posed to this Court in *Crouch v. Gillispie*, 240 W.Va. 229, 809 S.E.2d 699 (2018).

In *Crouch,* the plaintiff alleged that the defendant, West Virginia Department of Health and Human Resources, had violated clearly established law by failing to follow its own Child Protective Services ("CPS") Guidelines. At issue in *Crouch* was whether "the CPS Guidelines rise to the level of a clearly established statutory or constitutional right[.]" *Crouch*, 240 W.Va. at 235, 809 S.E.2d at 705. This Court explained that specificity of a right is required:

> To prove that a clearly established right has been infringed upon, a plaintiff must do more than allege that an abstract right has been violated. Instead, the plaintiff must make a "particularized showing" that a "reasonable official would understand that what he is doing violated that right..."

Id.

Here, Mr. McDonald has alleged nothing more than a violation of abstract rights. He has not pointed to any clearly established law regarding training and supervision, and he has not provided a factual record relative to any officer training and supervision in connection with the facts of this case. Mr. McDonald furnished no particular criticism of the adequacy of the training or supervision of Cpl. Diamond or any other officer involved in this matter. Mr. McDonald has not identified any conduct on the part of Crawford or Aldridge that could be considered a violation of a clearly established law or right sufficient to overcome qualified immunity as described in *A.B., supra.* Accordingly, Crawford and Aldridge are entitled to qualified immunity on these claims.

B. THE CIRCUIT COURT ERRONEOUSLY CONCLUDED THAT MR. MCDONALD HAS PRESENTED A TRIABLE ISSUE OF FACT REGARDING ALLEGED FRAUDULENT, MALICIOUS, OR OPPRESSIVE CONDUCT BY CRAWFORD OR ALDRIDGE.

Qualified immunity can be defeated if the agency employee or official acted maliciously, fraudulently, or oppressively. Syl. Pt. 11, *A.B., supra.* Paragraph 40 of the circuit court's Order defines the terms fraud, malice, and oppression. JA0019. In Paragraph 41, the circuit court appears to conclude that a question of fact exists with respect to whether Petitioners behaved maliciously, fraudulently, or oppressively:

> When taking into consideration the ruling in A.B., the above definitions of fraudulent, malicious and oppressive along with the actions implemented on Plaintiff by the individual Defendants and the alleged failure of Defendants WVRJA, Crawford and Aldridge to protect Plaintiff, the Court finds that none of these Defendant [sic] are entitled to a ruling of summary judgment in this matter. Rather, the Court finds that the issues raised in this case are questions properly for a jury to decide.

JA0020. There are no facts alleged below, or any factual support for any conduct on the part of Crawford or Aldridge that could remotely be considered malicious, fraudulent, or oppressive, in connection with training and supervision or otherwise. The circuit court does not identify any such conduct that would potentially defeat qualified immunity. Therefore, its conclusion that qualified immunity is defeated on this basis is unsupported and erroneous.

C. THE CIRCUIT COURT ERRONEOUSLY CONCLUDED THAT CRAWFORD AND ALDRIDGE CAN BE VICARIOUSLY LIABLE FOR THE TORTIOUS CONDUCT OF OTHER WVRJCFA EMPLOYEES.

The remaining claims against Crawford and Aldridge are based on vicarious liability for the allegedly tortious conduct of other correctional officers.[12] Paragraph 19 of the circuit court's Order erroneously concludes that "Crawford and Aldridge can be held vicariously liable for the actions and inactions of all WRJ employees[.]" JA0009.[13]

The conclusion that Crawford and Aldridge could be held vicariously liable for the actions of others is unsupported and contrary to West Virginia law. When an agent or employee commits a tort against a third party, "his principal or employer may also be held liable" if the agent or employee is acting within the scope of his employment. Syl. Pt. 3, *Musgrove v. Hickory Inn, Inc.*,

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[12] There is no factual support for any claim against Crawford and Aldridge for violation of Mr. McDonald's constitutional rights, because there is no evidence of personal involvement by Crawford or Aldridge in any of the alleged events. The circuit court's order expressly finds that Crawford and Aldridge "cannot be held vicariously liable for 42 U.S.C. 1983 violations[]" of others. JA0014. Although Paragraph 26 asserts that the restraint chair was "in an open and obvious location that is known to and acknowledged by the supervisory Defendants" (JA0011-0012), there is no citation to the record for this.

[13] Similarly, Paragraph 31 erroneously concludes that "the supervisory Defendants can be held vicariously liable for the actions of the individual Defendants." JA0014.

168 W.Va. 65, 281 S.E.2d 499 (1981). This Court has further "generally accepted the proposition that an employer may be liable for the conduct of an employee . . . so long as the employee is acting within the scope of his general authority and for the benefit of the employer." *Travis v. Alcon Laboratories, Inc.*, 504 S.E.2d 419, 431, 202 W.Va. 369, 381 (1998). A fundamental prerequisite of this analysis is a master and servant relationship, such as between an employer and an employee. While the other correctional officers could be considered employees or agents of WVRJCFA, there is no analysis in the circuit court's order explaining how they could be considered employees or agents of Crawford or Aldridge individually. To the extent that this flawed analysis prevented summary judgment from being entered in favor of Crawford and Aldridge, the circuit court's decision should be reversed.

IV. CORRECTIONAL OFFICERS PAUL DIAMOND, DON VANCE, DAVID RODES, AND JOSHUA SCARBERRY ARE ENTITLED TO QUALIFIED IMMUNITY ON MR. MCDONALD'S CLAIMS BASED ON THE RECORD PRESENTED BELOW.

The circuit court denied summary judgment to Correctional Officers Diamond, Vance, Rodes, and Scarberry, without conducting any analysis regarding the conduct of each officer in connection with Mr. McDonald's claims. This has resulted in a flawed analysis and an erroneous denial of summary judgment based on qualified immunity.

A. THE CIRCUIT COURT ERRED IN FAILING TO EVALUATE QUALIFIED IMMUNITY IN CONNECTION WITH MR. MCDONALD'S CLAIMS OF VIOLATION OF HIS CONSTITUTIONAL RIGHTS BASED ON ALLEGED EXCESSIVE FORCE AND ALLEGED FAILURE TO PROVIDE MEDICAL CARE.

Mr. McDonald alleges that his constitutional rights were violated based on use of excessive force against him and failure to provide medical care. The circuit court's order found that in order to prevail on his claims pursuant to 42 U.S.C. § 1983, Mr. McDonald must demonstrate "First, that the conduct complained of was committed by a person acting under color of state law; Second, that this conduct deprived the Plaintiff of rights, privileges or immunities secured by the

constitution or laws of the United States; and, Third, that the Defendants' acts were the proximate cause of the injuries and consequent damages sustained by the Plaintiff." JA0010.

Paragraph 23 states, "As for the first element, the Court finds that the offending officers were 'acting under color of state law' as they were performing duties well within the scope of their WVRJA employment." JA0011. This is an inappropriate finding of fact, as the court's function at the summary judgment phase is to determine whether there exists a genuine issue for trial. Nonetheless, the Order does not identify the "conduct complained of," which should be the entire focus of its analysis. It is vague to the extent that it refers collectively to "the offending officers" without indicating what conduct of each officer is being addressed. There is further no clarification regarding the "duties" that the court has considered as part of its analysis.

Compiling on these errors, the Order essentially skips the second element. It states in Paragraph 24 "that Plaintiff, as a pre-Trial detainee, is afforded rights, privileges or immunities secured by the constitution or laws of the United States, specifically, the Fourteenth Amendment." JA0011. The court does not reach the relevant question of whether *the specific conduct complained of* deprived Plaintiff of any of these rights, privileges, or immunities and provides no analysis on this central point. Therefore, the court never actually identifies the conduct of each Petitioner that it concludes could constitute a potential violation of Mr. McDonald's rights

Similarly, Paragraph 25 states "the evidence produced in the discovery phase clearly could prove the underlying Defendants' 'acts were the proximate cause of the injuries and consequent damages sustained by the Plaintiff.'" JA0011. Again, this vaguely refers to "Defendants" collectively and without any factual description of the actions at issue.[14] Paragraph 28 states, "the

[14] The statement in Paragraph 25 that "Plaintiff's account was not contradicted by any witness, and there was no tangible evidence presented by the Defendants which could lead any reasonable person to believe the injuries were not caused by the alleged excessive force by the Defendants" (JA 0011) is contrary to the entire record as described above in the Statement of Facts.

trier of fact could find, the facts above clearly show the unreasonableness of the pain and suffering inflicted upon Plaintiff at the hands of the individual Defendants is deliberate and blatant and using the objective standard, the trier of fact could conclude the same." JA0013. Again, this is confusing and unclear as it refers to the "individual Defendants" collectively without engaging in any discussion of the actions of each that the court considers a potential violation of rights.

These findings are erroneous because there is no factual support for concluding that Cpl. Diamond or Officers Rodes, Vance, or Scarberry engaged in any conduct which violated Mr. McDonald's rights. Most importantly, the circuit court's analysis of these issues did not take into account the defense of qualified immunity for such claims.

Pretrial detainees may be detained and subjected "to the restrictions and conditions of the detention facility so long as those conditions and restrictions do not amount to punishment, or otherwise violate the constitution." *Bell v. Wolfish*, 441 U.S. 520, 536-537 (1979). In *Kingsley v. Hendrickson*, 576 U.S. 389, 135 S. Ct. 2466 (2015), the Supreme Court of the United States held that for a pretrial detainee to establish an excessive force claim under the Fourteenth Amendment, he need not show that the officer was subjectively aware that the use of force was excessive; rather he need only show the force purposely, knowingly, or possibly recklessly used against him was objectively unreasonable. *Kingsley*, 135 S. Ct. at 2470. However, *Kingsley* did not address whether this "objective" standard applies to other claims by pretrial detainees pursuant to the Fourteenth Amendment (e.g. deliberate indifference to serious need). The *Kingsley* court held that:

> [A] pretrial detainee must show only that the force *purposely or knowingly* used against him was *objectively unreasonable*. Nevertheless, a court cannot apply this standard mechanically . . . A court must make this determination from the perspective of a reasonable officer on the scene, including what the officer knew at the time, not with the 20/20 vision of hindsight. . .

Kingsley, 135 S. Ct. at 2473. Moreover, while the Supreme Court indicated that the list was not exhaustive:

> Considerations such as the following may bear on the reasonableness or unreasonableness of the force used: the relationship between the need for the use of force and the amount of force used; the extent of the plaintiff's injury; any effort made by the officer to temper or to limit the amount of force; the severity of the security problem at issue; the threat reasonably perceived by the officer; and whether the plaintiff was actively resisting.

Id.

Furthermore, although the extent of an injury received can be a consideration, the objective reasonableness "inquiry in both contexts focuses on the force itself rather than the injury." *Young v. Lacy*, 2018 U.S. Dist. LEXIS 167832, *20-21, 2018 WL 4659341 (S. D. W.Va. Sept. 28, 2018) (*citing Coley v. Lucas Cty., Ohio*, 799 F.3d 530, 539 (6th Cir. 2015)).

The Eighth Amendment protects inmates from "inhumane treatment and conditions while imprisoned." *Ballard v. Delgado*, 241 W. Va. 495, 505, 826 S.E.2d 620, 630 (2019) (citing *Williams v. Benjamin*, 77, F.3d 756, 761 (4th Cir. 1996). "It is obduracy and wantonness, not inadvertence or error in good faith, that characterizes the conduct prohibited by the Cruel and Unusual Clause" *Id.* (citing *Whitley v. Albers*, 475 U.S. 312, 319 (1986)). With respect to the deployment of chemical agents, the West Virginia Supreme Court has adopted the holdings of the federal courts that "it is generally recognized that it is a violation of the Eighth Amendment for prison officials to use mace, tear gas or other chemical agents in quantities greater than necessary or for the *sole purpose of infliction of pain.*" *Id.* (citing *Iko v. Shreve*, 535 F.3d 225, 235 (4th Cir. 2008)) (emphasis added). Moreover, courts must "account for the legitimate interest that stem from [the government's] need to manage the facility in which the individual is detained, appropriately deferring to policies and practices that in the judgment of jail officials are needed to preserve internal order and discipline and to maintain institutional security." *Bell*, 441 U.S. 520, 540 (1979). In assessing use-of-force cases involving chemical agents on already convicted

inmates, this Court has applied the four-prong test set forth in *Iko v. Shreve*, *supra*, to determine the subjective component of a use of force claim in the Eighth Amendment context:

> "The Supreme Court has set forth four non-exclusive factors to assist courts in assessing whether an officer has acted with "wantonness": (1) "the need for the application of force;" (2) "the relationship between the need and the amount of the force that was used;" (3) the extent of any reasonably perceived threat that the application of force was intended to quell; and (4) "any efforts made to temper the severity of a forceful response."

Ballard v. Delgado, 241 W. Va. at 506, 826 S.E.2d at 631 (citing *Iko*, 535 F.3d at 239).

With respect to Mr. McDonald's claim that he was denied medical care, although his claims must be analyzed under the Fourteenth Amendment, "case law interpreting the standard of deliberate indifference under the Eighth Amendment is instructive." *Johnston v. Myers*, C/A No. 0:19-756-HMH-PJG, 20019 U.S. Dist. LEXIS 59704, 2019 WL 1517105 *n2 (D. S. C. April 8, 2019), *citing Brown v. Harris*, 240 F.3d 383 (4th Cir. 2001) (stating that whether the plaintiff is a pretrial detainee or a convicted prisoner, the "standard in either case is the same – that is, whether a government official has been 'deliberately indifferent to any his medical needs.'").

"[I]t is well settled that prison officials are entitled to rely upon the professional judgment of trained medical personnel." *Kinder v. PrimeCare Medical, Inc.*, No. 3:13-31596, 2015 WL 1276748, *8 (S.D.W.Va. March 19, 2015), *citing Milder v. Beorn*, 896 F.2d 848, 854 (4th Cir. 1990); and *Shakka v. Smith*, 71 F.3d 162, 167 (4th Cir. 1995). In order to state a claim of deliberate indifference against "non-medical prison personnel," Mr. McDonald must allege that each individual was "personally involved in the treatment or denial of treatment, or that [s/he] deliberately interfered with treatment, or that [s/he] tacitly authorized or [was] indifferent to the medical provider's misconduct." *Kinder v. PrimeCare Medical, Inc.*, No. 3:13-31596, 2015 WL 1276748, *8 (S.D.W.Va. March 19, 2015), *citing Milder v. Beorn*, 896 F.2d 848, 853 (4th Cir. 1990).

Overlaid with these considerations is qualified immunity under federal law, which shields government officials performing discretionary functions "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). The Supreme Court of the United States and the United States Court of Appeals for the Fourth Circuit have noted that, "[q]ualified immunity protects 'all but the plainly incompetent or those who knowingly violate the law.'" *Willingham v. Crooke*, 412 F.3d 553, 559 (4th Cir. 2005) (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)). An official's actions only violate a clearly established right when "in the light of preexisting law the unlawfulness" of the subject action is apparent. *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). Further, "[o]fficials are not liable for bad guesses in gray areas; they are liable for transgressing bright lines." *Maciariello v. Sumner*, 973 F.2d 295, 298 (4th Cir. 1992). In determining whether the right violated was clearly established, the court defines the right "in light of the specific context of the case, not as a broad general proposition." *Parrish v. Cleveland*, 372 F.3d 294, 301-02 (4th Cir. 2004). The doctrine of qualified immunity "balances two important interests--the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Pearson v. Callahan*, 555 U.S. 223, 230 (2009).

Qualified immunity provides more than immunity from damages, but also affords immunity from the burdens of litigation itself. *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) ("[q]ualified immunity provides 'an immunity from suit rather than a mere defense to liability...it is effectively lost if a case is erroneously permitted to go to trial.'"). Federal courts have interpreted the qualified immunity defense as applying to correctional officers sued in 1983 claims. *Crawford-El v. Britton*, 523 U.S. 574, 118 S.Ct. 1584 (1998).

B. CPL. PAUL DIAMOND IS ENTITLED TO QUALIFIED IMMUNITY IN CONNECTION WITH MR. MCDONALD'S CLAIMS OF VIOLATION OF HIS CONSTITUTIONAL RIGHTS BASED ON ALLEGED EXCESSIVE FORCE AND ALLEGED FAILURE TO PROVIDE MEDICAL CARE.

Cpl. Diamond is entitled to qualified immunity because there is insufficient evidence that he violated any clearly established right of Mr. McDonald. The doctrine of qualified immunity provides wide latitude to prison officials in making decisions, so long as the decisions do not violate a clearly established right.

In the case at bar, neither spraying Mr. McDonald with O.C., nor making the decision to place him in the restraint chair, meet the standard set forth by the United States Court in *Iko v. Shreve*, *supra.* While these standards apply to the subjective considerations of an Eighth Amendment deliberate indifference case, they are relevant considerations for determining whether the conduct of Cpl. Diamond in the case at bar was objectively reasonable under a Fourteenth Amendment analysis. See, *Young v. Lacy*, 2018 U.S. Dist. LEXIS 167832, *20-21, 2018 WL 4659341 (S. D. W.Va. Sept. 28, 2018).

First, with respect to Cpl. Diamond spraying Mr. McDonald with O.C., the conduct was objectively reasonable. There was clear need for the use of force. Cpl. Diamond could tell Mr. McDonald was high on drugs and was acting erratically in the booking area. Mr. McDonald refused multiple orders by Cpl. Diamond and other officers present in the booking area to go into the holding cell. Mr. McDonald admits he refused the order and the video and audio evidence shows not only did Mr. McDonald refuse the order, but continued to refuse the order after it was given multiple times. The video evidence further shows Cpl. Diamond attempted to talk Mr. McDonald into going to the holding cell for nearly a full minute prior to deploying the O.C., and that he warned Mr. McDonald he would be sprayed if he did not comply. Cpl. Diamond, Carl

Aldridge, and fact witness Major Christopher Fleming each testified that based on their experience, an inmate's refusal to comply with officer orders poses a serious safety risk. JA0190, 0222, 0227.

The relationship between the need and the amount of the force that was used was also reasonable. It is undisputed that only one .5 second burst of O.C. was deployed against Mr. McDonald. Immediately after the spray, Mr. McDonald dropped to the ground and was placed in restraints. There are no allegations of additional, or otherwise unnecessary, force.

The third prong the Court must consider is "the extent of any reasonably perceived threat that the application of force was intended to quell." The facts of this case demonstrate that Mr. McDonald was perceived as a danger to WRJ officers and to himself, based on his behavior, his refusal of orders, and based on the surroundings. When Mr. McDonald was refusing orders, the booking area of WRJ was busy, and there were multiple new arrestees on the benches nearby awaiting processing. JA0186, JA0197. The time and resources of the officers were limited, and they had to consider the safety of all who were present. Mr. McDonald was not in restraints at the time he refused the order and when he dropped a foam mattress he was carrying and assumed an aggressive posture toward the officers. JA0174, 0191. The video evidence confirms there were numerous other unrestrained arrestees nearby who could have also posed a safety risk if the officers were occupied for a prolonged period of time by Mr. McDonald.

The final factor to be considered is whether Cpl. Diamond made "any efforts to temper the severity of a forceful response." This prong is easily met. Mr. McDonald was immediately taken to decontaminate by washing his face with water, and was then taken outside for fresh air.

In the specific context of this case, and in light of preexisting law, spraying Mr. McDonald with O.C. was not unlawful. Therefore, it would not have been reasonably apparent to an officer

in Cpl. Diamond's position that spraying Mr. McDonald with O.C. was unlawful, and therefore, he is entitled to qualified immunity.

Mr. McDonald's confinement in a restraint chair was also reasonable in light of the circumstances and does not constitute excessive use of force. It is undisputed that Mr. McDonald had just been brought to WRJ after being arrested by the Putnam County Sheriff's Department. To prevail on a conditions of confinement claim, a pretrial detainee must show (1) an express intent to punish, or (2) lack of a reasonable relationship to a legitimate nonpunitive governmental objective, from which a punitive intent may be inferred. *Hill v. Nicodemus*, 979 F.2d 987, 991 (4th Cir. 1992), *citing Martin v. Gentile*, 849 F.2d 863, 870 (4th Cir. 1988). Prison officials act with the requisite culpable intent when they act with deliberate indifference to the inmate's suffering. *See*, *Farmer v. Brennan*, 511 U.S. 825 (1994). The Supreme Court has stated that the unnecessary infliction of pain includes inflictions of pain that are "totally without penal justification." *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981). "When prison officials stand accused of using excessive physical force in violation of the Cruel and Unusual Punishment Clause, the core judicial inquiry is "whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm." *Cantrell v. Rubenstein*, No. 2:14-cv-17419, 2016 U.S. Dist. LEXIS 134737, 2016 WL 5723601, at *19 (S.D. W. Va. Aug. 23, 2016).

In this matter, Mr. McDonald was placed in a restraint chair because he was a safety risk to himself and WRJ officers. After being placed in the recreation yard to decontaminate, Mr. McDonald was acting erratically, shouting and yelling, "but nothing he was saying was making sense. He was just talking out of his head." JA0192. He was banging his head off the door. JA0192.

Paragraph 7 of the Order alleges "the evidence showed that, the Defendants had other means to subdue Plaintiff." JA0005. The paragraph includes several examples, such as placing Mr.

McDonald "in an interview room, with or without restraints," "in a non-contact interview room," or in a "suicidal 'pickle suit' in one of the aforementioned rooms." JA0005. This paragraph imprecisely refers to "Defendants" collectively. Additionally, there is no testimony in the record which would support the availability of these alternatives in this situation, and they appear to be based on sheer speculation. Each of these "other means" would not have prevented Mr. McDonald from hitting his head against a door or wall, which is the behavior that was deemed to be creating a danger to Mr. McDonald, and which factored into Cpl. Diamond's decision to place him in a restraint chair. JA0186, 0198.

In the chair, Mr. McDonald continued to exhibit erratic behavior by being disruptive, loudly singing religious songs, attempting to kick the door and knock the chair over, shouting and yelling at officers and nurses, attempting to get out of the restraint chair, and even threatening to kill officers. JA0199-0210. While all of this was happening, WRJ officers continued to ensure Mr. McDonald received food, water, medical checks, and stretching breaks. JA0199-2010.

All of the evidence suggests that Cpl. Diamond made the decision to place Mr. McDonald in the restraint chair in "a good-faith effort to maintain or restore discipline." *Cantrell*, *supra*. There is no evidence to suggest he acted "maliciously or sadistically to cause harm." *Id.* In the specific context of this case, and in light of preexisting law, the decision to place Mr. McDonald in the restraint chair was not unlawful. Therefore, it would not have been reasonably apparent to an officer in Cpl. Diamond's position that doing so was unlawful, and therefore, he is entitled to qualified immunity.

The only remaining conduct at issue is the continued use of the restraint chair for approximately 28 hours. The issue of inmates in restraint chairs for prolonged periods of time has

been considered by numerous courts.[15] Courts in the Fourth Circuit have found that "placement of recalcitrant, disruptive, or suicidal inmates in restraint chairs as a means to maintain 'order and control' is not a violation of the Constitution." *Strickland v. Turner*, No. 9:15-0275-PMD-BM, 2018 U.S. Dist. LEXIS 50870, 2018 WL 3151639, at *19 (D.S.C. Jan. 26, 2018), Report Recommendation Adopted, No. 19:15-cv-275-PMD-BM, 2018 U.S. Dist. LEXIS 48251, 2018 WL 1443953 (D.S.C. Mar. 23, 2018) (citing *Williams v. Benjamin*, 77 F.3d 756, 763-764 (4th Cir. 1996) (finding that officer's decision to confine plaintiff in restraints after disturbance was not an unreasonable attempt to restore "order and control" to the situation); *Coleman v. McMillan*, No. 1:12-1916-JFA-SVH, 2013 U.S. Dist. LEXIS 186464, 2014 WL 1249290, at *5 (Mar. 26, 2014) (placement in restraint chair in order to prevent plaintiff from disrupting the orderly operations of the facility as well as potentially causing injury to himself, the staff, and the facility found to be proper). Courts have further found that a prisoner's placement in a restraint chair "does not in and

[15] A federal court in the Fourth Circuit recently determined that holding a convicted prisoner in restrains for 50 hours was insufficient to state a claim for deliberate indifference under an Eighth Amendment analysis. See, *Holloman v. Kiser*, 2021 U.S. Dist. LEXIS 61975 (W. D. Va. March 31, 2021) ("By comparison, the Eighth Circuit has held that a plaintiff-prisoner failed to state a claim against prison officials who left the plaintiff in restraints for an entire day. *Reynolds v. Dormire*, 636 F.3d 976, 979 (8th Cir. 2011). In *Reynolds*, prison officials placed the plaintiff in restraints in order to transport the plaintiff to a medical appointment and the officials refused to remove the restraints during the day-long journey. *Id.* at 978. That court reasoned that the complaint was "devoid of any allegation suggesting that the two [prison officials] acted with deliberate indifference to [the prisoner's] safety in restraining him throughout the day." *Id.* at 979. Numerous other courts have reached similar conclusions. See, e.g., *Williams v. Collier*, 357 F. App'x 532, at *3 (4th Cir. 2009) (holding district court did not err in granting summary judgment on an Eighth Amendment claim for time spent in a restraint chair); *Cunningham v. Eyman*, 17 F. App'x 449 (7th Cir. 2001) (holding that sixteen hours in shackles, four or five of which were spent in soiled clothing, is uncomfortable, but not unconstitutional under the Eighth Amendment); *Holley v. Johnson*, No. 7:08cv00629, 2010 WL 2640328, at *14 (W.D. Va. June 30, 2010) (concluding "that the only reasonable inference to be drawn from the type and extent of the injuries [the plaintiff] has proven is that application of ambulatory restraints for 48 hours is not use of force that offends contemporary standards of decency so as to satisfy the objective component of an excessive force claim"); *Sadler v. Young*, 325 F. Supp. 2d 689, 700-704 (W.D. Va. 2004) (finding that correctional officers did not violate inmate's Eighth Amendment rights by putting him in five-point restraints following incident where inmate "slapped" a tray at an officer, but they did violate inmate's rights by leaving him in restraints for 47 hours, arbitrarily confined to a mattress, on his back, with each arm restrained and a belt over his chest, with only brief breaks), reversed on other grounds by 118 F. App'x 762 (4th Cir. 2005).

of itself constitute an excessive use of force, as the use of devices such as restraint chairs [...] have repeatedly been found to be constitutional when used appropriately." *Rodriguez v. Taylor*, No. 9:08-1027-RBH, 2008 U.S. Dist. LEXIS 129448, 2008 WL 5244480, at *8 (D.S.C. Dec. 15, 2008). See also, *Mackey v. Anderson Cnty. Det. Ctr.*, No. 6:06-1180-GRA-WMC, 2007 U.S. Dist. LEXIS 41302, 2007 WL 1656231 (D.S.C. Jun. 6, 2007) (finding detainee's placement in a restraint chair for 12 hours was not a *per se* constitutional violation); *Blakeney v. Rusk Co. Sheriff*, 89 Fed.Appx. 897, 899 (5th Cir. 2004) (holding that pretrial detainee's rights were not violated when he was placed in a restraint chair for 20 hours after he disobeyed orders and engaged in unruly, destructive practices, since the purpose was not punishment).

Mr. McDonald has failed to present any evidence that the conduct of Cpl. Diamond was punitive in nature. Rather, the totality of the circumstances presented by Mr. McDonald's conduct on the night in question clearly shows that his placement in the restraint chair was initially warranted due to his behavior on the recreation yard and continued to be appropriate as a result of his erratic behavior once in the restraint chair.

Further, there is no factual basis upon which to attempt to hold Cpl. Diamond liable for the entirety of the time that Mr. McDonald was restrained. According to the record presented, Cpl. Diamond was not present during the entire time because he went off shift. He explained that "there was a period of time where I wasn't on shift, my shift had ended, and it went to another shift." JA0313. It would have then been up to the supervision, as well as medical personnel, "to make a determination based on his behavior how long he was to stay in the chair for his safety for erratic behavior[.]" JA0313. Mr. McDonald was in the chair "for a couple of shifts." JA313. Eventually, Cpl. Diamond came back on shift because he is the individual that ultimately released Mr. McDonald from the chair. JA0207.

In the specific context of this case, and in light of preexisting law, any role that Cpl. Diamond played in continuing to keep Mr. McDonald restrained was not unlawful. Therefore, it would not have been reasonably apparent to an officer in Cpl. Diamond's position that doing so was unlawful, and therefore, he is entitled to qualified immunity.

Mr. McDonald's claim for failure to provide medical care likewise fails. "[I]t is well settled that prison officials are entitled to rely upon the professional judgment of trained medical personnel." *Kinder v. PrimeCare Medical, Inc.*, No. 3:13-31596, 2015 WL 1276748, *8 (S.D.W.Va. March 19, 2015), *citing Milder v. Beorn*, 896 F.2d 848, 854 (4th Cir. 1990); and *Shakka v. Smith*, 71 F.3d 162, 167 (4th Cir. 1995). In order to state a claim of deliberate indifference against "non-medical prison personnel," Mr. McDonald must allege that each individual was "personally involved in the treatment or denial of treatment, or that [s/he] deliberately interfered with treatment, or that [s/he] tacitly authorized or [was] indifferent to the medical provider's misconduct." *Kinder v. PrimeCare Medical, Inc.*, No. 3:13-31596, 2015 WL 1276748, *8 (S.D.W.Va. March 19, 2015), *citing Milder v. Beorn*, 896 F.2d 848, 853 (4th Cir. 1990). Mr. McDonald was seen numerous times by PrimeCare staff in regular intervals throughout his time in the restraint chair. Cpl. Diamond, as "non-medical prison personnel," is entitled to rely on the professional judgment of these trained medical personnel regarding the need, or the absence of any need for medical treatment. There is no factual support for any allegation that Cpl. Diamond was personally involved in the denial of treatment, that he deliberately interfered with treatment, or that he was indifferent to a medical provider's misconduct. In the specific context of this case, and in light of preexisting law, Cpl. Diamond did not unlawfully fail to provide medical care. Therefore, it would not have been reasonably apparent to an officer in Cpl. Diamond's position

that his actions in connection with the provision of medical care were unlawful, and therefore, he is entitled to qualified immunity.

C. OFFICERS VANCE, RODES, AND SCARBERRY ARE ENTITLED TO QUALIFIED IMMUNITY IN CONNECTION WITH MR. MCDONALD'S CLAIMS OF VIOLATION OF HIS CONSTITUTIONAL RIGHTS BASED ON ALLEGED EXCESSIVE FORCE AND ALLEGED FAILURE TO PROVIDE MEDICAL CARE.

The circuit court's analysis fails to identify any conduct on the part of Officers Vance, Rodes, and Scarberry specifically that could be considered a constitutional violation, or that would overcome qualified immunity. For purposes of establishing a constitutional violation, Mr. McDonald must allege personal involvement on the part of each individual in a constitutional violation and demonstrate a causal connection between the act and his alleged injury. *Green v. Rubenstein*, 2010 U.S. Dist. LEXIS 52535, *11, citing *Zatler v. Wainwright*, 802 F.2d 397, 401 (11th Cir. 1986). Factually, specific acts or omissions by each individual which allegedly violated Mr. McDonald's constitutional rights must be alleged. *Green*, 2010 U.S. Dist. LEXIS 52535, *11, citing *Wright v. Smith*, 21 F.3d 496, 501 (2d Cir. 1994) (additional citation omitted).

Mr. McDonald claims that being sprayed with O.C. was unlawful and violated his rights. However, based on the record, the spraying was done solely by Cpl. Diamond. Other officers may have been present when Mr. McDonald was sprayed by O.C., but there is no evidence that they played any role in that action or decision. In the specific context of this case, specifically regarding simply being present when Mr. McDonald was sprayed by O.C., and in light of preexisting law, it would not have been reasonably apparent to any of these other officers that any conduct by them was unlawful, and therefore, they are entitled to qualified immunity.

Similarly, the record shows that the decision to place Mr. McDonald in the restraint chair was made by Cpl. Diamond. JA0300. While Officer Rodes is identified as having assisted in placing Mr. McDonald in the restraint chair, there is no evidence that Officer Rodes played any

role in making that decision. JA0193, 0198. Beyond the initial decision to place Mr. McDonald in the restraint chair, it was in the discretion of the supervising officer on shift, based upon behavior and input from medical staff, how long the inmate would remain in the restraint chair. JA0313-0314. There is no evidence that Officers Vance, Rodes, or Scarberry were ever in a position of determining when it was appropriate to release Mr. McDonald from the restraint chair, and Mr. McDonald has not produced any documents or witnesses implicating them in any decision that resulted in his continuing to be held in the restraint chair. Mr. McDonald has not pointed to any conduct by these officers involving the restraint chair that he believes to be unlawful. Therefore, in the specific context of this case, and in light of preexisting law, it would not have been reasonably apparent to any of these other officers that any conduct by them in connection with the restraint chair was unlawful, and therefore, they are entitled to qualified immunity.

Officers Vance, Rodes, and Scarberry are "non-medical prison personnel" entitled to rely on the professional judgment of trained medical personnel regarding the need, or the absence of any need for medical treatment. There is no factual support for any allegation that Officers Vance, Rodes, or Scarberry were personally involved in the denial of treatment, that they deliberately interfered with treatment, or that they were indifferent to a medical provider's misconduct. In the specific context of this case, and in light of preexisting law, Officers Vance, Rodes, and Scarberry did not unlawfully fail to provide medical care. Therefore, it would not have been reasonably apparent to an officer in their positions that their actions in connection with the provision of medical care were unlawful, and therefore, they are entitled to qualified immunity.[16]

[16] To the extent that the circuit court's order found a triable issue of fact on a claim of deliberate indifference against Crawford and Aldridge (JA0011-0012), this is not supported in the record. Crawford and Aldridge were even further removed from any direct contact with Mr. McDonald during the events in question, and would equally have been entitled to rely on the professional judgment of trained medical personnel with respect to the need for medical treatment. Thus, they would be entitled to qualified immunity for this claim under the same analysis.

D. THE CIRCUIT COURT ERRED IN CONCLUDING THAT MR. MCDONALD HAS ALLEGED VIOLATION OF CLEARLY ESTABLISHED LAW REGARDING HIS TORT CLAIMS AGAINST CPL. DIAMOND AND OFFICERS VANCE, RODES, AND SCARBERRY, AND THEY ARE ENTITLED TO QUALIFIED IMMUNITY.

Mr. McDonald alleges various tort claims against Cpl. Diamond and Officers Vance, Rodes, and Scarberry. The circuit court incorrectly concluded that the various general statements and provisions cited by Mr. McDonald constituted "clearly established law" in connection with these claims, and therefore incorrectly denied summary judgment.

The circuit court correctly concluded that "all WVRJA employees'/agents' respective actions/inactions could likely be determined to be discretionary." JA0014. Therefore, the first element of qualified immunity is met, and immunity is warranted unless Mr. McDonald shows that Cpl. Diamond and Officers Vance, Rodes, and Scarberry violated clearly established laws of which a reasonable person would have known. Syl. Pt. 11, *A.B.*, *supra.*

Mr. McDonald argues that West Virginia Regional Jail and Correctional Facility Authority's Policy and Procedure Statement 9031, regarding use of force, is a "clearly established law" which was allegedly violated. The circuit court erroneously adopted this conclusion in its Order, discussing this Policy and Procedure Statement in Paragraphs 33, 34, 35, and 36. JA0015-0018. However, Policy and Procedure Statement 9031 does not constitute a clearly established law for qualified immunity purposes because it does not clearly define any rights.

As argued in Section III. A., above, not every law, statute, rule, policy, procedure, or enactment will be considered "clearly established law" for purposes of defeating qualified immunity. Even if these Officers failed to follow certain internal policies or procedures as generally alleged by Mr. McDonald, they are not "clearly established law" that could defeat qualified immunity unless they grant inmates specific rights. *A.B.*, 234 W.Va. 492, 766 S.E.2d

751, 776. Indeed, this Court has expressed wariness "of allowing a party to overcome qualified immunity by cherry picking a violation of any internal guideline..." *Crouch v. Gillispie*, 240 W.Va. 229, 237, 809 S.E.2d 699, 707. For example, this Court has specifically determined that the Prison Rape Elimination Act ("PREA") does not constitute clearly established law because it does not grant prisoners any specific rights. *A.B.*, 234 W.Va. 492, 766 S.E.2d 751, 774 (additional citations omitted). As a result, this Court found that neither PREA nor the standards promulgated at its direction provide any basis to defeat qualified immunity under West Virginia law. *Id.*, 766 S.E.2d at 774. Likewise, Policy and Procedure Statement 9031 does not provide any basis to defeat qualified immunity in this case.

In this matter, the circuit court did not conduct the required analysis to determine whether Policy and Procedure Statement 9031 is a "clearly established law" under the standards set forth by this Court in *A.B.* This situation is analogous to the question posed to this Court in *Crouch v. Gillispie*, 240 W.Va. 229, 809 S.E.2d 699 (2018). In *Crouch,* the plaintiff alleged that the defendant, West Virginia Department of Health and Human Resources, had violated clearly established law by failing to follow its own Child Protective Services ("CPS") Guidelines. At issue in *Crouch* was whether "the CPS Guidelines rise to the level of a clearly established statutory or constitutional right[.]" *Crouch*, 240 W.Va. at 235, 809 S.E.2d at 705. This Court explained that specificity of a right is required, and that the "plaintiff must make a 'particularized showing' that a 'reasonable official would understand that what he is doing violated that right...'" *Id.*

Here too, Mr. McDonald has alleged nothing more than a violation of abstract rights. Additionally, for all of the reasons set forth in Section IV. A., B., and C., above, there is no factual basis to conclude that these Officers violated any portion of the internal policy relied upon by Mr. McDonald. Mr. McDonald has not identified any conduct on the part of Cpl. Diamond or Officers

Vance, Rodes, or Scarberry that could be considered a violation of a clearly established law or right sufficient to overcome qualified immunity as described in *A.B., supra.* Accordingly, these Officers are entitled to qualified immunity on Mr. McDonald's tort claims.

E. THE CIRCUIT COURT ERRONEOUSLY CONCLUDED THAT MR. MCDONALD HAS PRESENTED A TRIABLE ISSUE OF FACT REGARDING ALLEGED FRAUDULENT, MALICIOUS, OR OPPRESSIVE CONDUCT BY CPL. DIAMOND AND OFFICERS VANCE, RODES, AND SCARBERRY.

Qualified immunity can be defeated if the agency employee or official acted maliciously, fraudulently, or oppressively. Syl. Pt. 11, *A.B., supra.* As stated in Section III. B., above, Paragraph 41 of the circuit court's Order appears to conclude that a question of fact exists with respect to whether Petitioners behaved maliciously, fraudulently, or oppressively. JA0020. The circuit court does not identify any conduct on the part of any particular individual that it finds to constitute potential malice, fraud, or oppression. There are no facts alleged below, or any factual support for any conduct on the part of Cpl. Diamond, or Officers Vance, Rodes, and Scarberry, that could be considered malicious, fraudulent, or oppressive. The circuit court does not identify any such conduct that would potentially defeat qualified immunity. Therefore, its conclusion that qualified immunity is defeated on this basis is erroneous and unsupported.

V. THE WVRJCFA IS ENTITLED TO QUALIFIED IMMUNITY ON MR. MCDONALD'S CLAIMS BASED ON THE RECORD PRESENTED BELOW.

The claims pursuant to 42 U.S.C. § 1983 for alleged constitutional violations are not asserted against the WVRJCFA. JA0068. Nevertheless, the circuit court's Order erroneously concludes in Paragraph 26 "that a prison official, such as . . . WVRJA" can be held liable under the Eight Amendment for deliberate indifference to inmate health or safety. JA0011. This finding is clearly erroneous because the WVRJCFA is a state agency, not a prison official, and is expressly not a person who can be liable for deliberate indifference under 42 U.S.C. § 1983. Claims under

42 U.S.C. § 1983 are specifically directed at "persons." 42 U.S.C. §1983; *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 60 (1989). "[N]either a State nor its officials acting in their official capacities are 'persons' under §1983." *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 71 (1989); *Preval v. Reno*, 203 F.3d 821 (4th Cir. 2000) (unpublished).

With respect to Mr. McDonald's tort claims, the WVRJCFA is entitled to qualified immunity for the same reasons that the individual officers are entitled to qualified immunity. In the absence of a showing that discretionary governmental acts violated clearly established laws of which a reasonable person would have known, "both the State and its officials or employees charged with such acts or omissions are immune from liability." Syl. pt. 11, *Id.* Because each Petitioner is entitled to qualified immunity, so too is the WVRJCFA.

CONCLUSION

Petitioners are entitled to summary judgment with respect to Mr. McDonald's tort claims because the acts complained of constitute discretionary functions which do not violate any clearly established laws that a reasonable official should have known. With respect to Mr. McDonald's claims pursuant to 42 U.S.C. § 1983 for alleged excessive force and failure to provide medical care, these claims likewise fail. In light of existing law, there is no conduct on the part of Larry Crawford, Carl Aldridge, Cpl. Diamond or Officers Vance, Rodes, or Scarberry that was unlawful, or that they would have reasonably known to be unlawful, and therefore they are each entitled to qualified immunity under federal law for the complained of conduct. The circuit court's Order improperly fails to evaluate the claims against each Petitioner based on each Petitioner's individual conduct. The circuit court's Order does not provide a sufficient factual basis for its denial of summary judgment, and appears to be based upon an incorrect application of the law. Regardless,

this Court need not remand the case for clarification, because no sufficient basis to defeat qualified immunity appears in the record upon which summary judgment could have been denied.

Therefore, the Petitioners respectfully ask this Court to REVERSE the circuit court's order denying summary judgment on all claims, and to REMAND this case to the lower court with instructions to enter summary judgment on all claims, on the basis that the Petitioners are entitled to qualified immunity.

Respectfully Submitted,

Administrator Larry Crawford, Captain Carl Aldridge, C.O. Paul Diamond, C.O. Don Vance, C.O. David Rodes, C.O. Joshua Scarberry, and The West Virginia Regional Jail and Correctional Facility Authority,

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 21-0732

(Circuit Court of Cabell County Civil Action No. 18-C-240)

Administrator Larry Crawford, individually and in his official capacity; Captain Carl Aldridge, individually and in his official capacity; C.O. Paul Diamond, individually and in his official capacity; C.O. Don Vance, individually and in his official capacity; C.O. David Rodes, individually and in his official capacity; C.O. Joshua Scarberry, individually and in his official capacity; and The West Virginia Regional Jail and Correctional Facility Authority, an agency of the State of West Virginia

Defendants Below, Petitioners

vs. **No. 21-0732**

Michael A. McDonald,

Plaintiff Below, Respondent.

CERTIFICATE OF SERVICE

We certify that we have caused to be placed in first class mail, with postage prepaid, a copy of "Petitioner's Brief" to counsel of record as follows:

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