Connecticut Appellate Court

Petition for expedited review of order limiting access to court filings,
Conn. Gen. Stat. § 51-164x and Practice Book § 77-1.

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1. Relevant facts of the records access dispute.

In March 2018, Connecticut Department of Correction employees physically subdued J'Allen Jones at the Garner Correctional Institution, resulting in his death. The state's medical examiner attributed Mr. Jones's death to homicide. The entire sequence of events in Mr. Jones's death was videorecorded by the employees and retained by the Department of Correction.

Mr. Jones's estate (and the estate's fiduciary, individually) sued the correctional employees who they alleged to be responsible for his death, contending that their actions and inactions contravened Connecticut tort law and the United States Constitution. Revised Complaint [# 103.00], *Richardson v. Semple*, No. HHD-CV18-6098918-S (Conn. Super. Ct. Nov. 15, 2018).

In October 2019, the defendants and plaintiffs moved for entry of a stipulated protective order (Superior Court docket entry # 115.00, hereinafter "Joint Motion") that the Superior Court so-ordered two weeks later (# 115.86) in a one-word decision. The protective order solely governed "the use of Department of Correction (DOC) videotape recordings . . . during the litigation of" *Richardson v. Semple* by any party to the dispute or its counsel. Joint Motion 1. The order did not address the sealing of any court filing other than to state that:

> Before submitting the video/DVD recordings that [are] subject to this Protective Order with the Court and/or moving for their introduction into evidence, both parties will jointly request that the video/DVD recordings will be filed under seal.

Id 3. In March 2024, following discovery and motion practice, nine of the defendants filed a motion for summary judgment accompanied by a memorandum [Superior Court docket entry # 192.000, hereinafter "Defendants' Memo"]. The memorandum has ten exhibits, lettered A through J. According to the memorandum, Exhibit A is a "[v]ideo to be provided to court pursuant to [a]

protective order." In the defendants' own words, Exhibit A "record[s] the entirety of the event giving rise to the claims in this action," and they rely on it to provide "the undisputed facts" supporting their motion for judgment. Def.'s Memo 2. The defendants' arguments in favor of summary judgment rely almost exclusively on the video. They cite to the video approximately forty-eight times in the forty-nine page memo, characterizing the video's contents and Mr. Jones's actions in it, and ask the Superior Court to grant them summary judgment on the basis of those characterizations. *See*, *e.g.*, Defs.' Memo 10 (arguing that one of the defendants called for medical help "throughout the video"), 15 (arguing that "the video shows not indifference but active monitoring"), 17 (presenting the defendants' detailed view of when Mr. Jones's medical distress began), 18 (contending that, despite being minutes from his death, Mr. Jones was "still capable of moving, shouting, and yelling"), 19 (characterizing the video as depicting a "chaotic, evolving scene").

On September 27, 2024, the ACLU of Connecticut verified that the public docket in *Richardson* shows no motion to seal any filing, and no order sealing any filing. That same day, it requested a copy of the video.

After initially concurring that there was no reason not to produce a copy of the video, the Superior Court clerk's office conveyed that it would confer with the judge presiding over *Richardson*. On October 4th, the presiding judge of the Hartford judicial district denied the ACLU's request on the basis that the video "is under seal pursuant to a protective order issued by the court on November 13, 2019." The presiding judge noted that the *Richardson* plaintiffs had obtained a briefing schedule on the question of modifying the protective order, and conveyed that the ACLU's request would be denied "[u]nless and until such time as the protective order is vacated or modified." Letter from Hon. Lisa Morgan to Grace Sinnott, Oct. 4, 2024.

The presiding judge's denial of the ACLU's request is the decision "limit[ing] the disclosure of any . . . material on file with the court" from which it

now appeals. Conn. Gen. Stat. § 51-164x(c). *Accord* Practice Book § 77-1(a).

2. The video has never been sealed, could not be sealed, and must be furnished to the ACLU.

2.1. Protective orders do not govern the public's access to court records.

Protective orders are one of the means by which the superior court supervises the discovery process, which proceeds exclusively "in accordance with the provisions of" chapter 13 of the Practice Book, and without which litigants have no access to each other's information. A protective order may set the terms by which—if at all—a party "from whom discovery is sought" is required to furnish that information, ranging from not at all (an order "that the discovery not be had") to conditions limiting "the scope of the discovery . . . to certain matters." Practice Book § 13-5. They are predicated on an information holder's interest in the information in dispute, and on the use the seeker of the information wishes to put it to during the litigation, weighed against whether "good cause shown" counsels the limits. *Id.* Protective orders do not govern strangers to a litigation who neither seek information from a litigant nor are faced with a demand to furnish information to one.

2.2. Once information leaves the realm of discovery between parties and is filed with a court, strong standards tightly restrict limits on public access to that information.

Because "pretrial depositions and interrogatories are not public components of a civil trial," protective orders raise few constitutional concerns about their functioning as "a restriction on a traditionally public source of information." *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 33 (1984). In contrast, once a piece of information crosses over from discovery between

litigants into a filing submitted to a court, strong state and federal protections apply because court filings are a vital source of public information. *See*, *e.g.*, *Bank of Am. Nat'l Trust & Savings Ass'n v. Hotel Rittenhouse Assocs.*, 800 F.2d 339, 343 (3d Cir. 1986) (explaining that discovery between parties "stands on a different footing than does a motion filed by a party seeking action by the court.").

Our Practice Book codifies the common law right of records access, *Rosado v. Bridgeport Roman Catholic Diocesan Corp.*, 292 Conn. 1, 30 (2009), mandating that "there shall be a presumption that documents filed with the court shall be available to the public," and that the Superior Court "shall not order that any . . . materials on file with the court or filed in connection with a court proceeding be sealed or their disclosure limited." Practice Book §§ 11-20A(a),(b). The presumption attaches to all "judicial documents," that is, any "submitted to the court for its review in the discharge of the court's adjudicatory function." *Rosado v. Bridgeport Roman Catholic Diocesan Corp.*, 276 Conn. 168, 217 (2005).

Federal law contains a twin public access presumption. The First Amendment to the national constitution protects the public's access to court filings as a corollary to its right to attend court proceedings. *E.g.*, *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 93 (2d Cir. 2004). *See Martinez v. Empire Fire & Marine Ins. Co.*, 322 Conn. 47, 62 (2016) (explaining that the Connecticut courts, "[w]hen addressing questions of federal law . . . give special consideration to the decisions of the Second Circuit"). The First Amendment right of public access attaches to "judicial documents," that is, things filed with a court that are "relevant to the performance of the judicial function and useful in the judicial process." *United States v. Amodeo*, 44 F.3d 141, 145 (2d Cir. 1995).

Any order or decision to seal a court filing—that is, restrict it from public view—must clear the twin hurdles of the Practice Book and First Amendment. The former requires that a party seeking sealing of a court filing prove that sealing is warranted. *Vargas v. Doe*, 96 Conn. App. 399, 411-12 (2006). A court

may not grant sealing unless it "concludes that such order is necessary to preserve an interest which is determined to override the public's interest in viewing such materials" after first considering "reasonable alternatives to sealing." Practice Book § 11-20A(c). Any order sealing a judicial document "shall be no broader than necessary to protect such overriding interest." Id. § 11-20A(e). The First Amendment, meanwhile, forbids sealing unless the court "specific, on the record findings . . . demonstrating that closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 120 (2d Cir. 2006). "Broad and general findings" will not suffice to support sealing. *In re New York Times Co.*, 828 F.2d 110, 116 (2d Cir. 1987).

2.3. The video exhibit to the defendants' motion for summary judgment has never been sealed.

No party has moved to seal the video, and the Superior Court has never issued an order sealing it, meaning that the public's access to the video is entirely unimpaired and should be immediately produced. The presiding judge's denial decision concluded that the protective order in the case sealed the video, but it did not.

Firstly, the protective order simply required any litigation party who files the video with the court to *ask* that it be sealed, which none of them did. Secondly, the Superior Court is forbidden from sealing filings on litigants' say-so. Practice Book § 11-20A(c) ("An agreement of the parties to . . . limit the disclosure of documents on file with the court . . . shall not constitute a sufficient basis for the issuance of such an order."); *Travelers Indem. Co. v. Excalibur Reinsurance Corp.*, No. 3:11-CV-1209, 2013 WL 4012772, at *11 (D. Conn. Aug. 5, 2013) (explaining that the First Amendment mandates that, "[e]ven if the parties were able to agree as to which materials should be deemed 'confidential,' in order to seal, it remains incumbent on the Court to make" findings and consider narrow

tailoring).

Lastly, orders and decisions restricting public access to court records may not rely on unstated premises or implied conclusions. Any decision barring access "shall articulate the overriding interest being protected and shall specify its findings underlying such order and the duration of such order," including by issuing "[t]he time, date, scope and duration of any such order . . . in a writing." Practice Book § 11-20A(d). *See also Lugosch*, 435 F.3d at 120 (holding that the First Amendment requires every sealing order to set out "specific, on the record findings . . . demonstrating that closure is essential to preserve higher values and is narrowly tailored to serve that interest."). The protective order relied upon by the presiding judge neither considered nor adjudicated any of the Practice Book or First Amendment requirements, and so was never a valid sealing order.

2.4. The video cannot be sealed.

Finally, the video that the ACLU seeks cannot have been sealed, even on the merits, because the strong public interest in access that attaches to it cannot be overcome.

The video is a document to which the Practice Book and First Amendment protections unquestionably apply. In the former's terms, the video is a "document[] filed with the court," Practice Book § 11-20A(a), that the Superior Court "shall not order" restricted absent compelling reasons. *Id.* §§ 11-20A(b),(c). In the latter's, it is a document "relevant to the performance of the judicial function and useful in the judicial process," *United States v. Amodeo*, 44 F.3d 141, 145 (2d Cir. 1995), and as a summary judgment exhibit, it "should not remain under seal absent the most compelling reasons." *Joy v. North*, 692 F.2d 880, 893 (2d Cir. 1982) (reversing sealing order and applying its rule to "documents used by parties moving for, or opposing, summary judgment").

The weight that the defendants place upon the video in their summary judgment papers renders the item practically impossible to seal. It is the sole

piece of evidence on which they rely for the bulk of their legal arguments, and a decision in their favor would necessarily rest upon the Superior Court's interpretation of the video's contents. That type of evidence requires the public to have access to assess for itself both the behavior of its public employees at the Department of Correction, and the performance of its courts. *E.g.*, *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 598 (1978).

3. Conclusion

Because the video has never been and cannot be sealed, this Court should vacate the order of the Superior Court and remand with directions that it produce the video to the ACLU.

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Certifications

In conformance with Practice Book § 62-7, I certify that this brief (and any appendix) complies with the applicable rules of Connecticut appellate procedure, that any copy filed with the appellate clerk is a true copy of the one filed electronically, that it does not contain any names or other personal identifying information prohibited from disclosure by law, and that it has been transmitted to the following as of the date of this certification (including to the last known email address of each person or entity for whom an email address has been provided):

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Presiding judge, Richardson v. Semple

__/s/ Dan Barrett_____
Dan Barrett
ACLU Foundation of Connecticut
October 7, 2024

APPENDIX

DOCKET NO. HHD-CV18-6098918-S	:	**SUPERIOR COURT**
	:	
LYNNETTE RICHARDSON,	:	**J. D. OF HARTFORD**
Administratrix for the ESTATE OF	:	
J'ALLEN JONES.	:	**AT HARTFORD**
	:	
v.	:	
	:	
LIEUTENANT GARY GRAY, et al.	:	**JANUARY 4, 2023**

PROPOSED SECOND AMENDED COMPLAINT

Pursuant to Practice Book § 10-60(a)(3), Plaintiff Lynnette Richardson, Administratrix for the Estate of J'Allen Jones, submits this Proposed Second Amended Complaint:

FIRST COUNT: 42 U.S.C. § 1983
CRUEL AND UNUSUAL PUNISHMENT IN
VIOLATION OF THE EIGHTH AMENDMENT
(against Defendants Gray, Kacpryzski, Boucher, Rinaldi, Griffin, Guest, Busalacchi, Ginsberg and Rosado)

1. This action arises under 42 U.S.C. § 1983 for redress of violations of Plaintiff's rights secured by the Eighth and Fourteenth Amendments to the United States Constitution.

2. The Plaintiff, Lynnette Richardson, is the Administratrix for the Estate of J'Allen Jones.

3. During all times relevant to this action, Plaintiff's Decedent, J'Allen Jones, was incarcerated at the Garner Correctional Institution in Newtown, Connecticut.

4. During all times relevant to this action, the Defendant, Lieutenant Gary Gray was employed as a correctional officer at the Garner Correctional Institution and was acting under color of law.

5. During all times relevant to this action, the Defendant, Joseph Busalacchi was employed as a correctional officer at the Garner Correctional Institution and was acting under color of law.

6. During all times relevant to this action, the Defendant, Anthony Kacprzyski was employed as a correctional officer at the Garner Correctional Institution and was acting under color of law.

7. During all times relevant to this action, the Defendant, Gregory Boucher was employed as a correctional officer at the Garner Correctional Institution and was acting under color of law.

8. During all times relevant to this action, the Defendant, Carmine Rinaldi was employed as a correctional officer at the Garner Correctional Institution and was acting under color of law.

9. During all times relevant to this action, the Defendant, Medical Unit Officer Michael Ginsberg, was employed at the Garner Correctional Institution and was acting under color of law.

10. During all relevant times relevant to this action, the Defendant, Marc Griffin was employed as a correctional officer at the Garner Correctional Institution and was acting under color of law.

11. During all times relevant to this action, the Defendant, Medical Unit Officer Chasity Rosado was employed at the Garner Correctional Institution and was acting under color of law.

12. During all relevant times relevant to this action, the Defendant, Joseph Guest was employed as a correctional officer at the Garner Correctional Institution and was acting under color of law.

13. Each Defendant is sued in his or her individual capacity.

14. On March 25, 2018, Gray, Griffin, and Boucher escorted to a medical unit for psychiatric monitoring and support.

15. Despite the fact that Jones was exhibiting mental health symptoms, the Defendants handcuffed Jones, strip searched him and then subjected Jones to knee and fist strikes to his legs and torso.

16. Although Jones was handcuffed, restrained, helpless, and surrounded by as many as nine of the Defendants, the Defendants subjected Jones to fist and knee strikes to his legs and torso.

17. The Defendants covered Jones' face with a universal safety veil.

18. Defendant Gray then sprayed oleo capsicum "pepper spray" directly into Jones' face.

19. Jones was subjected to pressure on his neck and back and was unable to breathe.

20. Jones suffered unnecessary and wanton infliction of pain and serious injuries and died as a result of the Defendants' conduct after suffering excruciating physical pain and mental anguish.

21. All of the above constitute cruel and unusual punishment in violation of the Eighth Amendment.

22. As a direct and proximate result of the Defendants' conduct, Plaintiff's Decedent, J'Allen Jones, will be unable to make contributions to his household, resulting in loss of income and earning capacity to his estate.

23. As a further direct and proximate result of the Defendants' conduct, the Plaintiffs' Decedent was denied his normal and expected life span and enjoyments, including pursuit of family and other loving relationships, friendships, anticipated recreational activities and expected landmarks and achievements in his life and fulfillment of his life's goals and passions, all to the loss and detriment of his estate.

24. The Plaintiff Lynnette Richardson, Administratrix for the Estate of J'Allen Jones is entitled to an award of damages pursuant to 42 U.S.C. § 1983.

SECOND COUNT: 42 U.S.C. § 1983
FAILURE TO INTERCEDE TO PREVENT THE
VIOLATION OF THE EIGHTH AMENDMENT
(against Defendants Gray, Kacprzyski, Boucher, Rinaldi, Griffin, Guest, Busalacchi, Ginsberg and Rosado)

1-24. Paragraphs 1-24 of First Count are incorporated by reference as though set forth herein.

25. The Defendants who were present during the attack on Jones, Correctional Officers Gray, Busalacchi, Kacprzyski, Boucher, Rinaldi, Ginsberg, Griffin, Rosado, Guest, failed to intercede to prevent the Eighth Amendment violation, despite having a duty to do so.

26. Jones died as a result of the defendants' failure to intercede to prevent the constitutional violation.

27. Accordingly, the Plaintiff, Lynnette Richardson, Administratrix for the Estate of J'Allen Jones, is entitled to an award of damages pursuant to 42 U.S.C. § 1983.

THIRD COUNT: 42 U.S.C. § 1983
VIOLATION OF THE EIGHTH AMENDMENT
DELIBERATE INDIFFERENCE TO MEDICAL NEEDS
(against Defendants Gray, Kacprzyski, Boucher, Rinaldi, Griffin, Guest, Busalacchi, Ginsberg and Rosado)

1-26. Paragraphs 1-26 of the Second Count are incorporated by reference as though set forth herein.

27. Jones was subjected to being hog-tied by the Defendants, a dangerous procedure in which he was handcuffed, placed on his stomach, and subjected to pressure on his back neck and struggling to breach.

28. The danger to Jones' life was even more apparent following the use of pepper spray that caused difficulty breathing for Jones.

29. The Defendants failed to follow federal and state statutes and regulations, Department of Correction Administrative directives, unit policies and procedures, post orders and lawful orders/instructions in failing to attend to Jones' medical needs.

30. Each Defendant failed to be attentive to and conscious of changes in Jones' behavior and obvious physical distress.

31. Each defendant failed to monitor the physical side effects related to the use of physical force that Jones exhibited prior to his death, including difficulty breathing and becoming unresponsive.

32. None of the Defendants responded to obvious changes in Jones' behavior and demeanor demonstrating he was in physical distress.

33. The Defendants disregarded an excessive risk to Jones' health and safety, and Jones died as a result of the Defendants' deliberate indifference to his medical needs in violation of the Eighth Amendment.

34. Accordingly, the Plaintiff, Lynnette Richardson, Administratrix for the Estate of J'Allen Jones is entitled to an award of damages pursuant to 42 U.S.C. § 1983.

DEMAND FOR RELIEF

WHEREFORE, the Plaintiffs demands the following relief:

1. Money damages;

2. Attorneys' fees pursuant to 42 U.S.C. §1983 and 1988; and

3. Such other and further legal and equitable relief as the Court deems just and proper.

4. The amount in demand is greater than $15,000.00, exclusive of interest and costs.

THE PLAINTIFFS,
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ADMINISTRATRIX FOR THE ESTATE OF
J'ALLEN JONES.

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DOCKET NO. HHD-CV18-6098918-S

LYNETTE RICHARDSON, ADMINISTRATRIX, ET. AL. *Plaintiff*,	:	SUPERIOR COURT
v.	:	JUDICIAL DISTRICT OF HARTFORD
SCOTT SEMPLE, *et al.*, *Defendants*.	:	AUGUST 28, 2023

DEFENDANTS' ANSWER TO PLAINTIFF'S SECOND AMENDED COMPLAINT

FIRST COUNT: 42 U.S.C. § 1983
CRUEL AND UNUSUAL PUNISHMENT IN
VIOLATION OF THE EIGHTH AMENDMENT
(against Defendants Gray, Kacpryzski, Boucher, Rinaldi, Griffin, Guest, Busalacchi, Ginsberg and Rosado)

1. Denied.
2. Defendants lack sufficient knowledge or information to admit or deny this allegation and therefore leave the Plaintiff to her proof.
3. Admitted.
4. Admitted that Lieutenant Gary Gray was acting under color of law. Denied that Lieutenant Gary Gray was employed as a correctional officer.
5. Admitted.
6. Admitted.
7. Admitted.
8. Admitted that Lieutenant Carmine Rinaldi was acting under color of law. Denied that Lieutenant Carmine Rinaldi was employed as a correctional officer.
9. Denied to the extent this paragraph alleges that Michael Ginsburg was a "medical unit officer." The remainder is admitted.
10. Admitted.

11. Denied to the extent this paragraph alleges that Chasity Rosado was a "medical unit officer." The remainder is admitted.
12. Admitted.
13. Defendants lack sufficient knowledge or information to admit or deny this allegation and therefore leave the Plaintiff to her proof.
14. Admitted that Defendants Gray, Griffin, and Boucher escorted *Jones* to the medical unit.
15. As to the allegation that Jones was "exhibiting mental health symptoms," Defendants lack sufficient knowledge or information to admit or deny this allegation and therefore leave the Plaintiff to her proof. Admitted that Jones was handcuffed and strip searched, and that Defendant Boucher utilized a knee strike to Jones's thigh in an attempt to get Jones to stop resisting, that Defendant Kacprzyski delivered knee strikes to Jones's torso in an attempt to get Jones to stop resisting, and that Defendant Griffin utilized a fist strike to Jones's thigh in an attempt to get Jones to stop resisting.
16. Denied.
17. Admitted that Defendant Busalacchi placed a universal safety veil on Jones' head.
18. Admitted that chemical agent was utilized by Lt. Gray. Denied that it was "sprayed… directly into Jones' face."
19. Denied.
20. Denied.
21. Denied.
22. Denied.
23. Denied.
24. Denied.

SECOND COUNT: 42 U.S.C. § 1983
FAILURE TO INTERCEDE TO PREVENT THE
VIOLATION OF THE EIGHTH AMENDMENT
(against Defendants Gray, Kacprzyski, Boucher, Rinaldi, Griffin, Guest, Busalacchi, Ginsberg and Rosado)

1.-24. The defendants hereby incorporate their answers to paragraphs 1 through 24 above as if fully set forth herein.

25. Denied.

26. Denied.

27. Denied.

THIRD COUNT: 42 U.S.C. § 1983
VIOLATION OF THE EIGHTH AMENDMENT
DELIBERATE INDIFFERENCE TO MEDICAL NEEDS
(against Defendants Gray, Kacprzyski, Boucher, Rinaldi, Griffin, Guest, Busalacchi, Ginsberg and Rosado)

1-26. The defendants hereby incorporate their answers to paragraphs 1 through 26 above as if fully set forth herein.

27. [1] Denied.

28. Denied.

29. Denied.

30. Denied.

31. Denied.

32. Denied.

33. Denied.

34. Denied.

[1] There are two paragraphs labeled "27." Defendants respond to that paragraph labeled "27" under the Third Count here.

DEMAND FOR RELIEF

Defendants respectfully request the Court deny Plaintiff's demand for relief.

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

As Plaintiff seeks money damages against the Defendants in their individual capacities, the Defendants acted in an objectively reasonable manner, within the scope of their employment, and with an objective belief that their actions did not violate any clearly established law. The Defendants are entitled to qualified immunity from money damages.

SECOND AFFIRMATIVE DEFENSE

To the extent the complaint fails to state a claim for which relief may be granted it should be dismissed.

THIRD AFFIRMATIVE DEFENSE

Any of the alleged actions by the Defendants in using force against the plaintiff were justified or authorized by law and privileged, pursuant to Connecticut General Statute §§ 53a-17-53a-22.

DEFENDANTS' JURY DEMAND

Defendants respectfully seek, claim, and demand a trial by jury.

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Semple, et. al.

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CERTIFICATION

I hereby certify that a copy of the foregoing was mailed to the following on this 28th day of August 2023:

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DOCKET NO. HHD-CV18-6098918-S

LYNETTE RICHARDSON, ADMINISTRATRIX, ET. AL. *Plaintiff*,	:	SUPERIOR COURT
v.	:	JUDICIAL DISTRICT OF HARTFORD
SCOTT SEMPLE, *et al.*, *Defendants*.	:	MARCH 5, 2024

DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT

Pursuant to Connecticut Practice Book § 17-44, Defendants Gray, Rinaldi, Kacpryzski, Boucher, Griffin, Busalacchi, Guest, Rosado, and Ginsburg hereby move for summary judgment, for several reasons. First, the Plaintiff's claim for deliberate indifference to medical and mental health needs fail as a matter of law. Second, Nurse Rosado is entitled to judgment on all claims because she was not personally involved in any constitutional violation. Further, Defendants are entitled to qualified immunity on all claims. Finally, Defendants are also entitled to judgment on any failure to intervene claims for the aforementioned reasons. For these reasons, as described more fully in the accompanying memorandum of law, the Court should grant this motion and enter judgment in favor of the Defendants.

In support of this motion, Defendants submit the following exhibits:

Exhibit A: Video[1]

Exhibit B: State's Attorney File, including Security Division Investigation Report, State Police Report, and Report of the Office of the Chief Medical Examiner (738 Pages)

Exhibit C: Deposition of Dr. Stahl-Herz Part 1 (163 Pages)

[1] Defendants will provide the Court taking up this motion with a copy of the video to review in deciding said motion. This video depicts an escort through the interior of a high security correctional facility, including the operation of security doors, locations of cameras, use of restraints, and use of techniques to maintain control of inmates. It is thus subject to a protective order which restricts the dissemination of this video and filing of such video on the public docket. (Doc. # 115.00; Doc. # 115.86).

Exhibit D: Deposition of Dr. Stahl-Herz Part 2 (122 Pages)

Exhibit E: Deposition of Dr. Simopolous (199 Pages)

Exhibit F: Declaration of Lt. Gary Gray (2 Pages)

Exhibit G: Deposition of Lt. Gary Gray (101 Pages)

Exhibit H: Deposition of Nurse Ginsberg (79 Pages)

Exhibit I: Deposition of Nurse Rosado (62 Pages)

Exhibit J: Deposition of LCSW Dickison (98 Pages)

Exhibit K: Deposition of Dr. Tung (84 Pages)

Exhibit L: Deposition of Dr. Kocienda (93 Pages)

THE DEFENDANTS
SCOTT SEMPLE, et al.

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CERTIFICATION

This is to certify that a copy of the foregoing has been mailed and emailed, this day, March 5, 2024 to:

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__/s/_ *Janelle R. Medeiros*
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DOCKET NO. HHD-CV18-6098918-S

LYNETTE RICHARDSON, ADMINISTRATRIX, ET. AL. *Plaintiff*,	:	SUPERIOR COURT
v.	:	JUDICIAL DISTRICT OF HARTFORD
SCOTT SEMPLE, *et al.*, *Defendants*.	:	MARCH 5, 2024

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Pursuant to Connecticut Practice Book § 17-44, Defendants Gray, Rinaldi, Kacpryzski, Boucher, Griffin, Busalacchi, Guest, Rosado, and Ginsberg hereby move for summary judgment, for several reasons. First, the Plaintiff's claim for deliberate indifference to medical and mental health needs fail as a matter of law. Second, Nurse Rosado is entitled to judgment on all claims because she was not personally involved in any constitutional violation. Further, Defendants are entitled to qualified immunity on all claims. Finally, Defendants are also entitled to judgment on any failure to intervene claims for the aforementioned reasons. For these reasons, as described more fully below, the Court should grant this motion and enter judgment in favor of the Defendants.

I. BACKGROUND

This action was filed on August 15, 2018, alleging that the Decedent, J'Allen Jones—an inmate who was housed at Garner Correctional Institution at all times relevant to this case—was subjected to excessive force and deliberate indifference, leading to his death. (Doc. #182.00 at 4,

¶ 3).[1] Plaintiff brings this action pursuant to 42 U.S.C. § 1983 against several current and former Department of Correction (DOC) officials. Id. Plaintiff is Lynette Richardson, Decedent's former fiancé who purports to be the Administratrix of the Estate of J'Allen Jones. Id. at ¶ 2. Defendants Gray and Rinaldi were correctional Lieutenants at the time of the incident in the Complaint, Kacpryzski, Boucher, Griffin, Busalacchi, and Guest were correctional officers, and Nurse Ginsberg a Registered Nurse "RN" and Nurse Rosado a Licensed Practical Nurse ("LPN"). See Ex. B, Pgs. 26-28.

In the interest of brevity, Defendants refer the Court to the record evidence submitted in support of this motion and particularly the video[2] evidence recording the entirety of the event giving rise to the claims in this action for the undisputed facts. More detailed facts will be discussed as they relate to various arguments made in this motion.

II. ARGUMENT

A. Standard of Review

The law governing the standard of review for summary judgment is well-settled. Connecticut Practice Book § 17-49 requires that judgment shall be rendered forthwith if the

[1] The operative complaint in this matter is at Doc. # 182.00. While Plaintiff initially also brought claims against Commissioner Semple, then Warden Corcella, and Warden Dilworth, such claims were dismissed. (Doc. # 111.86; Doc. # 154.00). Plaintiff also attempted to bring a claim against Dr. Tung, the on-call psychiatrist on the day of Mr. Jones's death, but withdrew that claim, along with claims against an individual "Officer Ryan" who was apparently mistakenly identified in the Complaint. (Doc. # 180.00). Correctional Officer Bernard, who was involved in the incident, is not a party to this case. See Ex. B, Pg. 56.

[2] Defendants will provide the Court taking up this motion with a copy of the video to review in deciding said motion. This video depicts an escort through the interior of a high security correctional facility, including the operation of security doors, locations of cameras, use of restraints, and use of techniques to maintain control of inmates. It is thus subject to a protective order which restricts the dissemination of this video and filing of such video on the public docket. (Doc. # 115.00; Doc. # 115.86).

pleadings, affidavits, and any other proof submitted shows that there is no genuine issue as to any material fact and that the remaining party is entitled to judgment as a matter of law.

"The courts are in agreement that the moving party for summary judgment has the burden as to all material facts, which, under the applicable principles of substantive law, entitle him to a judgment as a matter of law." *Martel v. Metropolitan District Commission,* 275 Conn. 38, 46-47(2005). "To satisfy this burden, the movant must make a showing that it is quite clear what the truth is, and that excludes any real doubt as to the existence of any genuine issue of material fact." *Id.* "Once the moving party has met its burden, however, the opposing party must present evidence that demonstrates the existence of some disputed factual issue … It is not enough, however, for the opposing party to merely assert the existence of such a disputed issue." *Id.* A material fact is a fact that will make a difference in the result of the case. *Vitale v. Kowal,* 101 Conn. App. 691, 695 (2007). "An unsworn and conclusory assertion is insufficient to defeat a motion for summary judgment." See Practice Book § 17–45; 2830 *Whitney Avenue Corp. v. Heritage Canal Development Associates, Inc.,* 33 Conn. App. 563, 567(1994).

In order to defeat a motion for summary judgment, the opposing party must "provide an evidentiary foundation to demonstrate the existence of a genuine issue of material fact." *Barlow v. Palmer,* 96 Conn. App. 88, 92(2006). "An evidentiary showing is indispensable, [and] general averments will not suffice to show a triable issue of fact. Moreover, mere conclusions are insufficient as evidence… Indeed, the whole summary judgment procedure would be defeated if, without any showing of evidence, a case could be forced to trial by a mere assertion that an issue exists." *Farrell v. Farrell*, 182 Conn. 34, 40 (1980). Ultimately, to oppose a motion for summary

judgment successfully, the adverse party must recite specific facts to show a triable issue of material fact. Here, Plaintiff cannot do so, and accordingly, Defendants are entitled to judgment as a matter of law.

B. Plaintiff's deliberate indifference to medical needs claims fail as a matter of law.

To prevail on a claim of deliberate indifference to serious medical needs, "a plaintiff must provide evidence of sufficiently harmful acts or omissions and intent to either deny or unreasonably delay access to needed medical care or the wanton infliction of unnecessary pain by prison personnel." *Young v. Choinski*, 15 F. Supp. 3d 172, 181 (D. Conn. 2014) (citing *Estelle v. Gamble*, 429 U.S. 97, 104-106 (1976)). A plaintiff must show both that his medical need was serious, and that the defendant acted with a sufficiently culpable state of mind. *See Smith v. Carpenter*, 316 F.3d 178, 184 (2d Cir. 2003). However, "the Eighth Amendment is not a vehicle for bringing medical malpractice claims, nor a substitute for state tort law." *Young*, 15 F. Supp. 3d at 181 (quoting *Smith*, 316 F.3d at 184). Therefore, "not every lapse in prison medical care will rise to the level of a constitutional violation." *Id*. (quoting *Smith*, 316 F.3d at 184). "Mere negligence will not support such a claim under section 1983; there must be some conduct that 'shocks the conscience' or a 'barbarous act.'" *Id*. (citing *United States ex rel. Hyde v. McGinnis*, 429 F.2d 864 (2d Cir.1970)) (quotation omitted).

There are both objective and subjective components to the deliberate indifference standard. *See Hathaway v. Coughlin*, 37 F.3d 63, 66 (2d Cir. 1994). Subjectively, the defendants must have been actually aware of a substantial risk that the inmate would suffer serious harm as a result of their actions or inaction. *See Salahuddin v. Goord*, 467 F.3d 263, 279-80 (2d Cir. 2006). "[T]o

satisfy the subjective component, a prisoner must show deliberate indifference, i.e., that the charged official possessed 'a state of mind that is the equivalent of criminal recklessness.'" *Benjamin v. Pillai*, 794 F. App'x 8, 11 (2d Cir. 2019) (quoting *Hathaway v. Coughlin*, 99 F.3d 550, 553 (2d Cir. 1996)). "Objectively, the alleged deprivation must be 'sufficiently serious.'" *Oh v. Saprano*, No. 3:20-CV-237 (SRU), 2020 WL 4339476, at *4 (D. Conn. July 27, 2020) (quoting *Wilson v. Seiter*, 501 U.S. 294, 298 (1991)).

1. Claims against Custody Defendants

The subjective element of a deliberate indifference claim requires the plaintiff to show that correctional officials were actually aware of and disregarded a substantial risk of serious harm. *See Phelps*, 308 F.3d at 185-86. The defendants "must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and ... *must also draw that inference.*" *Farmer v. Brennan*, 511 U.S. 825, 837 (1994) (emphasis added). To establish the subjectivity element, the defendants must have acted with "a sufficiently culpable state of mind." *Hathaway*, 37 F.3d at 67 (citations omitted). The Supreme Court equates this standard with that of "recklessness" in criminal law. *Farmer*, 511 U.S. at 839-40. It is not enough that the prison official *should have known* of the risk to the prisoner; he or she must have *actually been aware* of a substantial risk of serious harm and ignored it. *Bell v. Luna*, 856 F. Supp. 2d 388, 398-99 (D. Conn. 2012); *see also Caiozzo v. Koreman*, 581 F.3d 63, 72 (2d Cir. 2009).

For that reason, "[a]llegations of negligent treatment and misdiagnosis do not state a cause of action under the Eighth Amendment." *Anderson v. Lapolt*, No. 9:07-CV-1184, 2009 U.S. Dist. LEXIS 92298, 2009 WL 3232418, at *13 (N.D.N.Y. Oct. 1, 2009); accord *Burgess v. Cnty. of*

Rensselaer, No. 1:03-CV-00652 (NPM-RFT), 2006 U.S. Dist. LEXIS 91521, 2006 WL 3729750, at *8 (N.D.N.Y. Dec. 14, 2006) ("[A] claim of misdiagnosis, faulty judgment, or malpractice without more to indicate deliberate indifference, is not cognizable under 42 U.S.C. § 1983."); *see also Harrison v. Barkley,* 219 F.3d 132, 139 (2d Cir. 2000) (noting that "a delay in treatment based on a bad diagnosis or erroneous calculus of risks and costs, or a mistaken decision… based on an erroneous view" cannot substantiate a deliberate indifference claim) (citation omitted).

The standard for deliberate indifference to medical needs is more forgiving for non-medical custody officials, due to the lack of medical training and medical knowledge that would be expected of a medical provider. *See, e.g., Liscio v. Warren*, 901 F.2d 274, 277 (2d Cir. 1990) (holding that *doctor's* indifference to inmate's three days of delirium during heroin withdrawal could constitute deliberate indifference, while custody officials did not), *overruled on other grounds Caiozzo*, 581 F.3d at 63; *Hodge v. Coughlin*, No. 92 Civ. 0622(LAP), 1994 U.S. Dist. LEXIS 13409, 1994 WL 519902, at *11 (S.D.N.Y. Sept. 22, 1994) (citations and internal quotation marks omitted), *aff'd*, 52 F.3d 310 (2d Cir. 1995); *Baumann v. Walsh,* 36 F. Supp. 2d 508, 512 (N.D.N.Y. 1999) (same). "[A]s non-medical personnel [defendants] may only be held liable for deliberate indifference to medical needs upon a showing that they intentionally denied or delayed plaintiff's access to medical care or intentionally interfered with medical treatment once it was prescribed." *Simmons v. Riley,* No. 9:18-CV-0984 (TJM/DEP), 2018 U.S. Dist. LEXIS 209101, at *5 (N.D.N.Y. Dec. 10, 2018); *see also Banks v. No. #8932 Corr. Officer*, No. 11-CV-8359, 2013 U.S. Dist. LEXIS 25507, 2013 WL 673883, at *4 (S.D.N.Y. Feb. 25, 2013) ("A prison guard's deliberate indifference to a serious medical need of a prisoner means intentionally denying or

delaying access to medical care or intentionally interfering with medical treatment once it was prescribed."); *see also Estelle*, 429 U.S. at 104-05 (noting that deliberate indifference may be manifested when prison guards intentionally deny or delay access to medical care).

To meet this standard, courts within the Second Circuit have required plaintiffs demonstrate a medical risk is extremely obvious and known to non-medical officials, including "when the inmate… has made his medical problems known to the attendant prison personnel," when medical staff informs an officer of an inmate's serious medical issue and it is ignored, or where there is evidence medical care was deliberately delayed as a form of punishment. *See, e.g., Lindsay v. Univ. of Conn. Health Ctr.,* No. 3:20-cv-173 (KAD), 2020 U.S. Dist. LEXIS 77035, at *6 (D. Conn. May 1, 2020) (inmate allegedly told staff of serious medical condition).[3] It is not enough that Defendants *could* have or *should* have known that Mr. Jones faced a risk of dying, they must have both (i) been aware of facts from which the inference could be drawn that Mr. Jones was dying, and (ii) have actually drawn that inference. *Farmer,* 511 U.S. 825, at 837; *Chance v. Armstrong*, 143 F.3d 698, at 702-703(2d Cir. 1998)

No such facts are present here. Plaintiff here cannot establish that the Defendants were actually aware Mr. Jones was dying or at risk of dying while they interacted with him. It is undisputed, for example, that none of the Defendants actually appreciated or understood that Mr.

[3] *See also, Feliciano v. Anderson*, No. 15CV4106LTSJLC, 2017 U.S. Dist. LEXIS 47893, 2017 WL 1189747, at *13 (S.D.N.Y. Mar. 30, 2017) ("Non-medical personnel may, for example, be deliberately indifferent if they delay access to medical care when the inmate is in extreme pain and has made his medical problems known to the attendant prison personnel."); *Moco v. Janik*, No. 17-CV-398-FPG, 2019 U.S. Dist. LEXIS 133783, at *4 (W.D.N.Y. Aug. 8, 2019) (inmate told staff he had broken ribs after assault, was ignored).

Jones was in medical distress until he was likely already deceased. All the Defendants were asked when they realized Mr. Jones was having a medical emergency, and all testified that they did not realize until just minutes or seconds before life-saving measures began—and some not until after CPR was started. See Ex. B, Pg. 49 (Gray); 50 (Rinaldi); 51 (Boucher); 53 (Griffin); 55 (Busalacchi, Guest); 57-58 (Ginsberg); 59-60 (Rosado). And there is no evidence to dispute Defendants' accounts, such as testimony from them, Mr. Jones, or from medical staff during the interaction that would indicate they knew of the risk to Jones. *See, e.g, Jones v. Alicea*, No. 3:22-cv-1154 (SVN), 2022 U.S. Dist. LEXIS 197355, at *9 (D. Conn. Oct. 31, 2022) (deliberate indifference where inmate was "bleeding profusely… wheezing, lying on the floor," the officer acknowledged the condition, yet refused to provide any assistance and said he "did not want to do paperwork and inmate lives do not matter to him."). Indeed, the findings of the DOC's formal investigation into the incident included only one violation of policy for all Defendants: that they "did not recognize the change in IM Jones's behavior and demeanor as an indication he was in physical distress." Ex. B, Pgs. 65-70. There, the investigator found that during the incident staff *unintentionally* failed to recognize Mr. Jones "became physically/medically distressed…" Id., Pg. 65. There is simply no evidence any of the Defendants were actually aware Mr. Jones was at risk of substantial harm for nearly the entire interaction with Mr. Jones.

To the contrary, throughout the video, the conversation between custody Defendants and Mr. Jones indicates they have no idea that Mr. Jones is at risk of death. They speak to and attempt to communicate with Mr. Jones throughout their entire interaction, including during the time they attempt to move him to a wheelchair near the end of the interaction. Officers can be heard asking

Mr. Jones to stand, to move to the wheelchair, and to cooperate with them. Ex. A, 20:33-22:58. And officers mentioned in interviews they believed Mr. Jones was faking, a tactic they had seen many non-compliant inmates use in the past. See 49, 50, 51, 52, 53, 55. Even during the time Mr. Jones is moved from cell 520 to 514, Lt. Gray informs staff that Mr. Jones is unlikely to cooperate with decontamination in a shower, so they will have to decontaminate him in the cell—a concern that would not matter if Gray and the other officers appreciated and understood the medical distress Mr. Jones was in. Ex. A, 23:33. Even when Mr. Jones is in the wheelchair, the custody Defendants are not actually aware that Mr. Jones is dying or in medical distress.

There are also no allegations that Mr. Jones ever told Defendants he was dying or in medical distress. Indeed, Plaintiff's own expert opines that because Mr. Jones was having a psychotic episode, he was "largely incapable" of understanding or communicating—through no fault of his own. Ex. E, Pg. 139:2-17; Pgs. 141-143. It is undisputed, for example, that Mr. Jones never said anything like "I can't breathe" or "I'm dying" or "this hurts," again, through no fault of his own. See Ex. A. On the contrary, to the extent Mr. Jones was coherent during the events of the video, he shouted things like "I command you in the name of Yahweh, Joshua, Jesus Christ to uncuff me now! Now!" Ex. A at 12:19-30. Further, his consistent and loud shouting throughout most of the incident would not have placed Defendants on notice that he was in any distress. *See Knox v. Lashbrook*, No. 03-446-CJP, 2006 U.S. Dist. LEXIS 65532, at *15 (S.D. Ill. Sep. 14, 2006) (finding no Eighth Amendment violation on part of correctional officers in part because "it was undisputed that plaintiff was yelling the whole time . . . thereby demonstrating that he could

breathe"). While in different circumstances Decedent could have put Defendants on notice of a serious risk, that simply did not occur here.

It is also undisputed that the custodial Defendants did not ignore any recommendations from medical staff, and that no medical provider informed the custodial Defendants that Mr. Jones was suffering a medical emergency. No medical provider, for example, recommended that Mr. Jones be transported to the hospital until life-saving measures began. *See Maldonado v. Town of Greenburgh*, 460 F. Supp. 3d 382, 389 (S.D.N.Y. 2020) (deliberate indifference was found where officers left a man who had been tasered and was unconscious without any medical treatment for 20 minutes despite advice of EMT to get him "immediate medical assistance"). And it is undisputed that none of the custody Defendants knew about Mr. Jones's underlying medical conditions, or anything that would put him at some greater risk of harm than the usual inmate undergoing a standard, routine controlled strip search and IPM placement. No medical provider told Defendants to stop the interaction or do anything differently. Neither did Defendants send away medical staff attempting to help. *See Stalley v. Cumbie,* No. 5:19-cv-280-JSM-PRL, 2021 U.S. Dist. LEXIS 183390, at *39 (M.D. Fla. Sep. 24, 2021) (deliberate indifference where officers sent nurses away rather than calling for help).

To the contrary, throughout the video, Lt. Gray repeatedly calls for medical assistance to check on Mr. Jones. When Mr. Jones initially refuses to comply with the strip search and begins chanting, Gray almost immediately exits the cell and asks medical for assistance, including medication. Ex. A, 07:24. Then, shortly afterwards, a nurse enters the cell, remains for about 30 seconds, and does not inform the officers of any medical emergency. Ex. A, 07:43. A few minutes

later, Mr. Jones stands, and the ensuing physical struggle continues, but as soon as Mr. Jones is secure, Gray again steps out of the cell, speaks with medical, and asks for an order for full stationary therapeutic restraints. Ex. A, 13:46. While waiting for medical staff to return, staff maintain control of Mr. Jones on the bunk while he continues to shout. Rather than being indifferent to Mr. Jones or refusing to call for medical help, just *seconds* after there is some sound of labored breathing, Gray once again exits the cell and states: "Can I get a nurse over here? Get me a nurse." Ex. A, 16:27-16:57; Ex. B, Pg. 39 (Investigator notes breathing labored at around 16:44);

Less than a minute later, a nurse once again enters the cell, administers an injection of sedative, and does not inform the officers of any medical emergency. Ex. A, 17:45-18:28. After the nurse leaves, Mr. Jones struggles. After Mr. Jones is under control again, only about a minute later, Gray again steps out of the cell, speaks to medical staff and says "Can you just come in and check on him?" Ex. A, 20:25. The nurse again enters the cell, checks on Mr. Jones, and exits. Ex. A, 20:25-21:00. Gray again asks for medical assistance while Mr. Jones is being transported from cell 520 to 514, and at least twice more once Mr. Jones is in cell 514. Ex. A, 23:33-24:00. After that point, medical staff is physically present.

The custody Defendants never sent medical away, ignored medical advice, or disregarded evidence informing them of a serious risk to Jones. Rather, throughout the incident they repeatedly sought out medical assistance and relied upon medical staff to determine if anything is wrong—which evinces concern and care for Mr. Jones—not indifference to Mr. Jones's condition. *See Farmer,* 844 ("prison officials who actually knew of a substantial risk to inmate health or safety

may be found free from liability if they responded reasonably to the risk, even if the harm ultimately was not averted"); *Wilson*, 961 F.3d at 844 ("[O]ur precedents do not require that prison officials take every possible step to address a serious risk of harm.").

Critically, the custody Defendants were entitled to rely on medical staff to alert them if Mr. Jones was suffering a medical emergency. It is well-settled that custody officials are entitled to rely on and defer to medical staff. *See, e.g. Nix v. Lester,* 16-CV-0828, 2017 U.S. Dist. LEXIS 124289, 2017 WL 3610576, at *8 (N.D.N.Y. Aug. 4, 2017) (recommending dismissal of the plaintiff's medical indifference claim against the corrections officer defendants—as non-medical professionals—because they were entitled to rely on the opinion of medical staff), *report and recommendation adopted* by 2017 U.S. Dist. LEXIS 133044, 2017 WL 3601239 (N.D.N.Y. Aug. 21, 2017) (Scullin, J.); *Houston v. Sheahan,* No. 13-CV-6594-FPG, 2017 WL 3425271, at *3 (W.D.N.Y. Aug. 9, 2017); *Joyner v. Greiner*, 195 F. Supp. 2d 500, 506 (S.D.N.Y. 2002); *Anderson v. Ford,* Civil No. 3:06CV1968 (HBF), 2007 WL 3025292, at *7 (D. Conn. Oct. 15, 2007) (citations omitted).[4]

[4] *See also Ross v. Kelly,* 784 F. Supp. 35, 46 (W.D.N.Y.), aff'd, 970 F.2d 896 (2d Cir. 1992) ("It is understandable and appropriate that civilian prison supervisory personnel would defer to the medical opinions of the prison doctors and other consulting physicians regarding the severity of plaintiff's condition and the proper course of treatment.") (citations omitted); *White v. Farrier*, 849 F.2d 322, 327 (8th Cir. 1988); *Battle v. Recktenwald,* No. 14 CV 2738 (VB), 2016 U.S. Dist. LEXIS 20432, at *27 (S.D.N.Y. Feb. 19, 2016); *Smiley v. Westby*, 1994 U.S. Dist. LEXIS 13413, No. 87 Civ. 6047, 1994 WL 519973, at *8 (S.D.N.Y. Sept. 22, 1994) (Preska, J.) ("[A] warden who receives assurances from his medical staff that an inmate is receiving appropriate care will ordinarily be insulated from § 1983 liability."); *Sylwestrowicz v. Todd*, 1995 U.S. Dist. LEXIS 12651, No. 3:95- CV-0218RP, 1995 WL 519769, at *2 (N.D. Ill. Aug. 10, 1995) (dismissing complaint against prison superintendent where he referred prisoner's grievance to medical department for response); *Liscio v. Warren*, 718 F. Supp. 1074, 1082 (D. Conn. 1989)(Cabranes, J.), *rev'd on other grounds*, 901 F.2d 274 (1990) (granting summary judgment to prison administrator, who "justifiably may defer to the medical expert regarding treatment of inmates/patients").

There is no evidence here that the custody Defendants had any reason to challenge or question the medical staff's judgment the several times they came into the cell or Gray called for their help. *Gonzalez v. Sarreck*, No. 08-CV-3661, 2011 U.S. Dist. LEXIS 122873, 2011 WL 5051341, at *14 (S.D.N.Y. Oct. 24, 2011) ("Non-medical Defendants . . . may not be held liable on a deliberate indifference claim unless a plaintiff can show that [they] should have challenged a doctor's diagnosis." (citing *Cuoco v. Moritsugu*, 222 F.3d 99, 111 (2d Cir. 2000))). None of the custody Defendants here are medical providers; they are not doctors or nurses. None have medical training sufficient to question a nurse's judgment or treatment. Because the custody Defendants repeatedly sought out medical care and they were entitled to rely on the medical judgment and care provided, Plaintiff's claim that they were deliberately indifferent is without merit. *Lopez v. City of N.Y.*, No. 1:19-cv-03887-MKV, 2021 U.S. Dist. LEXIS 24560, at *14-15 (S.D.N.Y. Feb. 9, 2021) ("Plaintiff does not allege that Avin or Mitchell had any medical training or reason to question the judgment of Appiah and the medical response team, including their diagnosis and treatment of Plaintiff, which renders Plaintiff's claims 'facially deficient.'").

To the extent Plaintiff may attempt to argue that Mr. Jones's risk of a medical emergency was obvious from Mr. Jones's behavior, their claim similarly fails. The Defendants' actions cannot be judged with 20/20 hindsight, knowing all we know now about Mr. Jones's medical and mental condition. Rather, their knowledge as to the seriousness of any medical condition is judged by the facts available to the Defendants at the time in light of on their knowledge and experience. *See Green v. Shaw*, Docket No. 3:17-cv-00913 (CSH), 2019 U.S. Dist. LEXIS 53981, at *16 (D. Conn. Mar. 29, 2019) *aff'd*, 827 F. App'x 95 (2d Cir. 2020).

Plaintiff's expert forensic pathologist, Dr. Stahl-Herz, attributes Mr. Jones's death to essentially an inability to breathe due to several factors: 1.) he believes the spit veil became saturated with "fluids" and OC spray, making it difficult for Jones to breathe, 2.) the use of the OC spray inhibited his breathing, and 3.) chest compression that inhibited his breathing. Ex. C, Pgs. 81-82; 96. He also testified that Mr. Jones's underlying heart disease, including an enlarged heart and clogged arteries, contributed to his death, as well as Decedent's physical exertion while struggling with Defendants. Ex. C, at Pgs. 79, 138, 145. Viewing this alleged risk from the Defendants' perspective, as the Court must, there is no evidence to suggest that the risk of death to Mr. Jones was known and obvious. It is undisputed that the Defendants had no idea that Mr. Jones had any underlying heart disease, which was a contributing factor to his death. None had ever viewed his medical chart or reviewed his medical records—which would not have been determinative anyway, because even Mr. Jones was unaware he had such a condition. Indeed, Dr. Stahl-Herz admitted that the Defendants "had essentially no expectation that he had this disease." Ex. C, 146. Nor should they. Mr. Jones was a relatively fit, healthy young man to all outward appearances. He was not obviously unhealthy, overweight, or suffering from any visible disease that could put the Defendants on notice that he would die during a relatively routine use of force. And at the start of the video, Defendants Gray, Kacpryzski, Boucher, Griffin, Busalacchi, Rosado, and Ginsberg are present when Mr. Jones's vitals are taken and appear normal—giving no indication to believe Mr. Jones would pass away in the next twenty minutes. Ex. A, 00:00-6:00.

As to the specific uses of force that Dr. Stahl-Herz testifies contributed to Mr. Jones's death, the Defendants similarly had no indication that such harm could result from their use. Use

of the spit veil—a lightweight, mesh garment designed to be breathable when saturated—is extremely common and authorized by policy. Ex. ¶ 10. Indeed, Gray has used the veil countless times, and this incident is the only of which he is aware where a person has died during use of the veil. Id. Similarly, OC spray is frequently used and authorized by policy to be used as it was here. Id. ¶¶ 11-12. Gray has also utilized OC spray and a spit veil in combination in other incidents, and it has not resulted in the death of the inmate. Id. As to "chest compression" from use of physical techniques to secure Mr. Jones, such techniques are again common, authorized by policy, and trained to DOC officers as appropriate for use. Id. ¶ 13. Again, Gray has supervised and used these techniques in the past, with no inmate deaths. Id. The Defendants could not possibly be actually aware that use of these tools and techniques, which are common, authorized by policy, and trained to correctional officers, would pose a substantial risk of serious harm to a healthy young man. While utilization of a technique or tool that is not authorized by policy or generally accepted to be dangerous may evince deliberate indifference, the exact opposite is true here. Defendants had no reason to know the use of these routine tools and techniques could contribute to Mr. Jones's death.

To the extent Plaintiff may argue that the risks inherent with chest compression or prone restraint are obvious, even setting aside the fact that such techniques are approved and utilized by DOC, the video shows not indifference but active monitoring for such a risk. Throughout the video, Gray monitored the weight and position of his officers, and corrected them when he had any concern for their techniques. For example, at 7:00 minutes on the video, Gray can be seen tapping Officer Kacprzyski on the shoulder, telling him to move his knee from Jones's shoulder. Later, at 7:53, Gray continues to monitor the positioning and pressure used, and tells the officers: "Stay off

his neck." Then, he tells the officers to keep Jones in an upright position, which they do, until Jones stands and struggles to get free from the officers. Ex. A, 11:11-12:32. After the ensuing struggle, when concerned about Mr. Jones's positioning, Gray tells the officers to "get him back on the bunk." Ex. A, 12:57. Gray again adjusts officers and tell them to "stay off his neck" at 17:12. During the video, while monitoring, Gray also calls for medical assistance, speaks with medical staff, or has medical staff in the cell at least eight times. Ex. A, 07:24; 07:43; 13:46; 16:27-16:57; 17:45-18:28; 20:25; 20:25-21:00; 23:33-24:00. This is not deliberate indifference or ignoring risks to Mr. Jones.

In her Complaint, Plaintiff alleges the Defendants "failed to be attentive to and conscious of changes in Jones's behavior and obvious physical distress." But to the extent Plaintiff's expert faults the custody Defendants for their actions, he states that they should have realized Mr. Jones's medical risk because of his labored breathing or wheezing. See Ex. C, D. Plaintiff can point to no other physical signs that would have made Defendants aware Mr. Jones was at risk of death. As discussed above, the fact that a defendant "failed to alleviate a significant risk that he *should have* perceived, but did not," does not constitute deliberate indifference. *See Farmer*, 511 U.S. at 838 (emphasis added). Even if it could, based on the facts and knowledge available to the Defendants at the time, it was reasonable for them to believe that Mr. Jones was not at risk of death from his breathing. Mr. Jones was calm and in no medical distress whatsoever for the first six minutes of the video. Ex. A, 00:01-7:00. During that time, vital signs are taken in front of the correctional officers and appear normal. Ex. A, 04:47-06:02. Upon the beginning of the strip search, Mr. Jones

begins screaming, shouting, and chanting, very loudly. Ex. A, 6:48. This loud chanting and shouting continues almost continuously throughout nearly the entirety of the next ten minutes.

While Mr. Jones is having some type of mental health issue, there is no indication that there is anything wrong with his breathing or medical condition. To the contrary, he is capable of shouting extremely loudly with no difficulty, so it would be reasonable for officials, who are lay people and not doctors, to believe his breathing was not impaired—as even their own expert recognized. See Ex. C, Pg. 44 (shouting "indicates that [Jones] is… able to move air" and even at 13:24, on video, Dr. Stahl-Herz could not say if he—a medical doctor—would appreciate Jones was having difficulty breathing). And Mr. Jones is physically struggling and moving—he stands at 12:32, which indicates he was physically able to move, struggle, and stand while still yelling. Ex. D, Pgs. 32-34 (Dr. Stahl-Herz agrees that even at 12:56 in the video, "the fact that [Jones] is able to talk and shout" and "able to stand and walk around" is a factor demonstrating he is not having difficulty breathing). Indeed, even once Jones is on the bunk, physically restrained, he continues to move and shout. Ex. A, 12:32-16:00. The first indication of labored breathing is audible around 16:30 on the video. Ex. A, 16:30. Rather than ignoring this, Gray calls for a nurse within *30 seconds* of the apparent difficulty breathing. Ex. A, 16:57. Even taking Dr. Stahl-Herz earlier time of 13:24, where he claims "there was, sort of, like a grunting noise" that "could possibly represent the first time" Jones makes a noise that could "potentially [be] indicative of trouble breathing" Gray similarly responds reasonably. Ex. C, Pg. 205. Less than a minute later, Gray is again speaking to and seeking medical help. See Ex. A, 13:24-14:00.

Keeping in mind that Mr. Jones had been yelling loudly and physically struggling for almost ten minutes at this point, it was reasonable for the Defendants to attribute Mr. Jones's labored breathing to yelling and exertion rather than medical distress. Ex. C, Pgs. 76-78 (yelling and physical exertion can lead to increase in respiratory rate); *See also Mann v. Taser Int'l, Inc.,* 588 F.3d 1291, 1308 (11th Cir. 2009) (finding no deliberate indifference by officers where man had been tasered, but his "physical resistance and verbal communication suggested [plaintiff] was not in immediate medical danger," yet they called for medical assistance anyway, and medical staff nearby shared the opinion that plaintiff was not at risk of immediate death, despite dying shortly afterward); *contrast Evans v. Columbia Cty.,* No. 1:20-CV-00722, 2024 U.S. Dist. LEXIS 5588, at *71 (M.D. Pa. Jan. 10, 2024) (correctional officers found to be deliberately indifferent where they stood outside cell for 55 minutes doing nothing, with inmate inside who had been fully restrained for 21 hours, wheezing, bleeding, and struggling to breathe with no explanation for injuries).

The officers' failure to appreciate Mr. Jones's condition after a sedative is administered to Mr. Jones in front of the officers was also reasonable. Following the administration of the sedative, Mr. Jones begins to quiet. Nevertheless, he is still capable of moving, shouting and yelling at that time—further indicating that he is not in medical distress. Ex. A, 18:48-19:15. The injection should have had the effect of calming and quieting Mr. Jones, an effect many of the officers had seen before. See Ex. B, Pgs. 49, 50, 51, 52, 53, 55. It was reasonable for them to believe that Mr. Jones quieting and apparently calming down was a result of the injection that had just been administered, rather than because he was in medical distress. Whether the injection did take effect or not is

irrelevant; all that matters is that the officers reasonably believed it did, explaining Mr. Jones's quieting and calming down. *See Borges v. Schenectady Cty.,* 20-CV-0245, 2020 U.S. Dist. LEXIS 163176, 2020 WL 5369808, at *7 (N.D.N.Y. Sept. 8, 2020) (collecting cases) (dismissing the plaintiff's medical indifference claims against the corrections officer sergeant defendant because there was no indication "that he, as a non-medical professional, had any way of knowing that the medical treatment Plaintiff received . . . would not improve Plaintiff's condition."). Even if their belief was unreasonable, it would not matter: "[t]he defendant's belief that his conduct poses no risk of serious harm (or an insubstantial risk of serious harm) need not be sound so long as it is sincere. Thus, even if objectively unreasonable, a defendant's mental state may be nonculpable" and not actionable. *Salahuddin* *281. This is exactly the case here.

Ultimately, Mr. Jones's death was caused by a "very complex sequence of events," which the custody officers did not anticipate. Ex. C, Pg. 197. With the benefit of hindsight, removed from the chaotic, evolving scene depicted in the video, anyone can identify things that should have or could have been done differently. But a deliberate indifference claim requires more. "It is obduracy and wantonness, not inadvertence or error in good faith, that characterize" deliberate indifference. *Whitley v. Albers,* 475 U.S. 312, 319 (1986). The record evidence here cannot support a finding of deliberate indifference against the custody Defendants, and they are entitled to judgment.

2. Claims against Nurse Ginsberg

Nurse Ginsberg is similarly entitled to judgment because Plaintiff cannot establish the subjective prong of her claim against him. A defendant who "failed to alleviate a significant risk that he should have perceived, but did not," does not constitute deliberate indifference. *See*

Farmer, 511 U.S. at 838. As discussed above, the subjective prong requires actual awareness, and for that reason, claims that a medical provider failed to fully appreciate the severity of an inmate's symptoms (even when he or she should have) do not amount to deliberate indifference. *See Harrison*, 219 F.3d at 139 (a medical practitioner who provides "treatment based on a bad diagnosis or erroneous calculus of risks and costs" does not evince the culpability necessary for deliberate indifference); *Thomas v. Wright*, No. 9:99CV02071(FJS)(GLS), 2002 U.S. Dist. LEXIS 19618, 2002 WL 31309190, at *9 (N.D.N.Y. Oct. 11, 2002) ("This court finds that the record clearly shows that the defendants were not deliberately indifferent to Thomas' serious medical needs. Although they may have failed to diagnose or even detect his cancer, the record does not show that they did so deliberately. Furthermore, the record does not show that they disregarded his medical needs. He was seen numerous times and given various medications"); *Halstat v. Bellon,* No. 3:13-CV-779 (JCH), 2014 U.S. Dist. LEXIS 134011, at *12 (D. Conn. Sept. 23, 2014) ("A difference of opinion, mistake in treatment, or even medical malpractice does not constitute a constitutional violation.").

Here, Nurse Ginsberg's conduct amounted to negligence at worst. Just as with the custody Defendants, Nurse Ginsberg did not realize the extent of Mr. Jones's medical distress until he had been moved to cell 514, just before starting life saving measures. At most, Plaintiff seems to claim that Nurse Ginsberg should have realized that Mr. Jones was in respiratory distress sooner than he did, or that he should have attributed Mr. Jones's difficulty breathing to medical distress rather than a result of his physical exertion and shouting. But as discussed above, given his normal vital signs and his continued shouting and struggling, it would have been reasonable for Nurse Ginsberg

to assume Mr. Jones's labored breathing was a result of exertion and shouting. It would have also been reasonable for him to believe that when he began to quiet, Jones was feeling the effects of the sedative he had just been given—not that he was dying.

Ginsberg's failure to appreciate the severity of Mr. Jones's condition is not enough to amount to deliberate indifference, because "[u]nder the subjective element, an inmate must prove that (i) a prison medical care provider was aware of facts from which the inference could be drawn that the inmate had a serious medical need, and (ii) that the medical-care provider actually drew that inference." *See Camera v. Freston*, No. 3:18-CV-1595(SALM), 2022 U.S. Dist. LEXIS 55068, *35 (D. Conn. Mar. 28, 2022) (citing *Farmer*, 511 U.S. at 837; *Chance,* 143 F.3d at 702-03; *Irby v. Frisnia,* 119 F. Supp.2d 130, 132 (N.D.N.Y. 2000) (granting summary judgment for insufficient evidence as to deliberate indifference where defendants were "[a]t most . . . guilty of negligence" in failing to diagnose plaintiff's injury, but where "this misdiagnosis was based on a reasonable, although incorrect, assessment of plaintiff's condition"). There is no evidence in the record to suggest that Nurse Ginsberg was ever actually aware that Mr. Jones was dying. Indeed, Plaintiff's own experts do not fault Ginsberg's actions, other than to opine that he should have realized the severity of the situation "sooner." Ex. E, Pgs. 176-178. This is not enough.

Because deliberate indifference requires actual awareness of a serious risk of harm, courts routinely grant summary judgment to medical providers who make mistaken diagnoses or fail to appreciate the severity of an inmate's medical symptoms. For example, in *Camera,* the Court found that medical providers, including doctors, who failed to appreciate or properly diagnose an inmate's cancer that caused his death were not deliberately indifference because they were not

actually aware of the risk of harm he faced. 2022 U.S. Dist. LEXIS 55068, at *44 ("[t]he most that [the plaintiff's] allegations show, however, is that the [defendants] misdiagnosed his injuries, and failed to recognize the severity of those injuries. Such allegations might conceivably show malpractice, but they do not state an Eighth Amendment claim." (citations omitted)).

Even more similarly, in *Caiozzo v. Koreman,* a correctional nurse failed to recognize that an inmate was suffering from alcohol withdrawal, because she believed (perhaps unreasonably) that the inmate had not had any alcohol that day. 581 F.3d 63, 67 (2009) *abrogated on other grounds by Darnell v. Piniero*. The parties agreed that with "proper diligence" the nurse would have realized the decedent was suffering from alcohol withdrawal. *Id.* Upon intake, the nurse had noted the inmate's vitals were normal though he was acting erratically and stated he was "possessed." *Id.* at 66-67. Later, the inmate began suffering obvious symptoms of alcohol withdrawal. The same nurse was called to his cell and the inmate explicitly told her he was experiencing alcohol withdrawal, yet the nurse did not enter the cell, examine the decedent, or ask him any questions, "any or all of which might have led her to observe alcohol withdrawal signs and symptoms." *Id.* The inmate died just a few hours later. *Id.* at 68. Nevertheless, the Second Circuit found that the correctional nurse was not liable for deliberate indifference, because though the evidence supported a claim that she "s*hould have* been aware that [decedent] was in immediate danger" she was not "actually aware of that immediate danger…wrongly though it turned out." *Id.* at 72 (emphasis in original).

The same analysis and conclusion applies here. Nurse Ginsberg did not realize that Mr. Jones could be at risk of "immediate danger" until he began lifesaving measures, just like the nurse

in *Caiozzo*. Indeed, the conduct in *Caiozzo* was significantly worse than anything Nurse Ginsberg did because there the decedent actually told the nurse she was in distress. Not so here. Failure to recognize a risk sooner is at best negligence and insufficient to claim deliberate indifference. For that reason, Nurse Ginsberg is entitled to judgment.

3. Any claim for deliberate indifference to mental health needs fails as a matter of law.

Plaintiff seems to also allege deliberate indifference to Mr. Jones's mental health needs. Such a claim is without merit and Defendants are entitled to judgment. Just as with medical needs, the "Eighth Amendment prohibits deliberate indifference to an inmate's serious mental health needs." *See Spavone v. New York State Dep't of Corr. Servs*., 719 F.3d 127, 138 (2d Cir. 2013) (The Eighth Amendment "forbids" not only "deliberate indifference to serious medical needs of prisoners," but also deliberate indifference to serious "mental health care" needs.) (internal quotation marks and citation omitted). But just as with deliberate indifference claims based on medical needs, Plaintiff must still establish both the subjective and objective prongs.

Here, it is undisputed that Mr. Jones was diagnosed with schizophrenia. Plaintiff's expert, Dr. Simopolous, testified that on the day of and for several days prior to the day of his death, Mr. Jones had been suffering from a psychotic episode, which could have included visual and auditory hallucinations, disconnect from reality, and delusions. Ex. E, Pg 180. It is unclear whether Mr. Jones had been taking his prescribed mental health medication prior to the day of his death, but that morning, his licensed clinical social worker (LCSW) Lindsey Dickison, determined that Mr. Jones had "decompensated" and that he should be moved to a higher level of care and monitoring in the IPM unit. Ex. J, Pg. 46. This determination was made by Ms. Dickison at about 10:30am,

during an evaluation of Mr. Jones—about thirty minutes before the start of the video footage capturing Mr. Jones transport. Ex. B, Pg. 241. Ms. Dickison obtained approval for this transfer from the on-call psychiatrist, and knew at the time she made this referral that Mr. Jones would have to undergo a controlled strip search upon placement in the IPM unit, per policy. Ex. J, Pg. 85. She did not raise any concerns about this, nor did she advise that she should be present during the strip search. Ex. F, Pg. 1.

It is undisputed that the Defendants, other than Nurse Rosado, were unaware that Mr. Jones had a diagnosis of schizophrenia. None of the custody Defendants nor Nurse Ginsberg reviewed Mr. Jones's medical records. It is also undisputed that the Defendants were only told that Mr. Jones needed to be transported to IPM for a mental health concern, but not that he was suffering from a psychotic episode, or the depth or severity of Mr. Jones's mental health condition. Nonetheless, Plaintiff's expert Dr. Simopoulos asserts that the Defendants should have known Mr. Jones was suffering from a psychotic episode on the day of his death—despite Mr. Jones's calm demeanor and the lack of any information about the severity of a psychotic episode during the first seven minutes of the video. Ex. E, Pg. 130 (chanting, yelling, etc. should indicate psychotic episode); Ex. A, appx. 7:00 (Jones begins chanting, yelling).

Though Plaintiff must establish the Defendants "deprived [Mr. Jones] of mental health care" it is unclear here exactly what mental health care Plaintiff claims Mr. Jones was denied. *Spavone*, 719 F.3d 127, 138. At the time of this incident, Mr. Jones had been under medical orders to be moved to IPM for his mental health treatment, which the Defendants were carrying out. There was no prescribed medication or other mental health treatment that the Defendants refused to give

or delayed access to. To the contrary, the entire interaction occurred with the purpose of placing Mr. Jones in a location to receive a higher level of mental health care.

Plaintiff's expert faults the custody Defendants[5] for several things: first, Dr. Simopolous argues that once the custody Defendants observed Mr. Jones's behavior, including "religious chanting, speaking religious gibberish, screaming out loud unintelligibly…" the custody Defendants should have "sought out mental health assistance." Ex. E, Pgs. 130-131. This is exactly what occurred here. Within approximately 30 seconds of Mr. Jones beginning to "scream[] out loud," Lt. Gray steps out of the cell, and requests that Ginsberg—a mental health nurse—obtain medication from the on-call mental health prescriber: Dr. Tung.[6] See Ex. A, 7:00-8:00. This thwarts any claim that the custody officials never sought out mental health assistance. Indeed, Plaintiff's expert opined that contacting Dr. Tung was appropriate. Ex. E, Pg. 131. Nevertheless, Dr. Simopolous claims that "ideally" Dr. Tung, who is not a defendant, should have physically come to the correctional facility to examine Mr. Jones. Ex. E, Pg. 145. And Dr. Simopoulous faults the custody Defendants for seeking mental health assistance from Nurse Ginsberg—their avenue to Dr. Tung—rather than calling LCSW Dickison (who cannot prescribe mental health medications). Ex. E, Pgs. 105-108. But this is not enough to establish deliberate indifference; it is merely a disagreement about the treatment and particular help sought. *See Gonzalez v. Sarreck*,

[5] Dr. Simopolous's opinions were "primarily regarding the officers." Ex. E, Pg. 177. He had essentially no opinion as to the conduct of Nurse Rosado, and his opinion as to Nurse Ginsberg was limited to the speed with which he called Dr. Tung for medication, and that they should have called for LCSW Dickison—neither of which supports a claim for deliberate indifference as described below. Ex. E, 177-178.

[6] Because it was a weekend, there was no mental health prescriber physically present in the facility. The only access to a mental health prescriber and medication was through Nurse Ginsberg to Dr. Tung. See Ex. B, Pg. 367.

2011 U.S. Dist. LEXIS 122873, 2011 WL 5051341 at *18 (S.D.N.Y. Oct. 24, 2011) ("It is well settled that disagreements over medications, diagnostic techniques, forms of treatment, or the need for specialists or the timing of their intervention are insufficient under [section] 1983."); *Silva v. Robleoo,* No. 3:22cv29 (MPS), 2023 U.S. Dist. LEXIS 6470, at *14 (D. Conn. Jan. 13, 2023) (a disagreement about a need for mental health medication is not enough to establish deliberate indifference).

Dr. Simopolous believes that medication "should have been offered earlier." Ex. E, 133. This opinion is perplexing, given that Dr. Simopolous also opines the officers should have been aware of Mr. Jones's state based on his shouting, and again, within approximately 30 seconds of Mr. Jones exhibiting this behavior, Lt. Gray asked for mental health assistance and medication. Ex. A, 6:30-8:00. There is no basis to suggest that seeking mental health medication within 30 seconds of potential signs it was needed constitutes deliberate indifference. Such a claim is nothing more than negligence. *Silva v. Robleoo*, No. 3:22cv29 (MPS), 2023 U.S. Dist. LEXIS 6470, at *15 (D. Conn. Jan. 13, 2023) (even a psychiatric APRN's failure to "recognize [plaintiff's] immediate mental health need for medication" such a claim amounts to negligence which does not satisfy the standard for Eighth Amendment deliberate indifference); *see Hernandez v. Keane*, 341 F.3d 137, 144 (2d Cir. 2003) (noting Eighth Amendment deliberate indifference requires a mental state "more blameworthy than negligence").

Dr. Simopolous also argues that the custody Defendants should have used "de-escalation techniques" which includes "communicating with the individual… telling them what you're going to be doing… taking time with them" or asking someone to "calm down." Ex. E, Pgs. 123-125.

Here, verbal communication with Mr. Jones occurs throughout the video. Lt. Gray can be heard "telling [him] what [the officers are] going to be doing" throughout the entire video, explaining to him what is going on as it is happening. Lt. Gray can also be heard talking to Mr. Jones, asking him to relax, telling him to take deep breaths, and reminding him they are there trying to get him the help he needs in IPM. See, e.g. Ex. A, 6:00-7:00; 7:04; 15:21; 16:57. Dr. Simopolous also stated that "sometimes repetition can help," which Lt. Gray can also be heard doing throughout the entire video. Ex. E, Pg. 137.

Even setting this aside, Dr. Simopolous also opined that Mr. Jones, from the time the strip search begins until the end of the interaction, was largely incapable of comprehending the statements made to him by officers due to his mental health crisis. Ex. E, Pgs. 139-140. As a result, he opines that beyond that point, Mr. Jones did not understand what the officers were saying to him, and as a result, verbal intervention like the Defendants offered was "useless"—a fact the custody Defendants would not be aware of, because they did not know Mr. Jones had schizophrenia, was suffering a psychotic episode, and could not comprehend what was going on. Ex. E, 138-140. Given this, any claims about an alleged lack of verbal intervention cannot amount to deliberate indifference. *Salahuddin*, 467 F.3d 263, 279 ("the charged official [must] act or fail to act while *actually aware* of a substantial risk that serious inmate harm will result.").

Finally, Dr. Simoplous testified that he believed use of therapeutic restraints "would be helpful" here. Ex. E, 134. Dr. Simopolous was not aware, apparently, that Lt. Gray requested an order for therapeutic restraints during this interaction, Nurse Rosado called Dr. Tung for the order, it was approved, and the custody officers were simply waiting for a cell with capability for those

restraints to be cleaned and available during the latter part of their interaction with Mr. Jones. Ex. B, Pgs. 47-49; Ex. A, 15:52.

Ultimately, of Dr. Simopolous's recommendations (even if recommendations were enough to establish deliberate indifference rather than negligence), the only one that was not attempted was calling LCSW Dickison to the scene. But it is undisputed that Lt. Gray called Ginsberg, a nurse stationed in the mental health unit with mental health experience, and Rosado to facilitate access to Dr. Tung—a prescribing psychiatrist and the highest-level mental health provider available. Dr. Simopolous faults the custody Defendants for not calling a different—and indeed, lower level— mental health provider than they did. This is simply not deliberate indifference. There is no evidence that the Defendants were "*actually aware* of a substantial risk of serious harm" from calling a psychiatrist for assistance rather than an LCSW. *Spavone*, 719 F.3d at 138 (internal quotation marks and citation omitted). Any claims for deliberate indifference to mental health needs are without merit and Defendants are entitled to judgment.

C. To succeed on an excessive force claim pursuant to the Eighth Amendment, a plaintiff must prove defendants used force maliciously and sadistically to cause harm.

"For 'a claim by a prisoner that he was subjected to excessive force by prison employees, the source of the ban against such force is the Eighth Amendment's ban on cruel and unusual punishments.'" *Ismael v. Charles*, No. 1:18-cv-3957-GHW, 2020 U.S. Dist. LEXIS 124292, at *14-15 (S.D.N.Y. July 15, 2020) (quoting *Wright v. Goord*, 554 F.3d 255, 268 (2d Cir.2009)); *see also Francis v. Briatico*, 214 Conn. App. 244, 250 (2022) (noting Eighth Amendment excessive force claims require evidence of "malevolent intent" by defendants). "A 'prisoner's claim must

'be judged by reference to this specific constitutional standard, rather than to some generalized 'excessive force' standard.'" *Id*. (quoting *Wright*, 554 F.3d at 268 (quoting *Graham v. Connor*, 490 U.S. 386, 394 (1989)).

"[T]he Eighth Amendment is offended by conduct that is 'repugnant to the conscience of mankind.'" *Ismael*, 2020 U.S. Dist. LEXIS 124292, at *15 (quoting *Crawford v. Cuomo*, 796 F.3d 252, 256 (2d Cir. 2015) (quoting *Hudson v. McMillian*, 503 U.S. 1, 9-10 (1992)). "Actions are repugnant to the conscience of mankind if they are 'incompatible with evolving standards of decency' or involve 'the unnecessary and wanton infliction of pain.'" *Id*. (quoting *Hudson*, 503 U.S. at 9-10). "[N]ot 'every malevolent touch by a prison guard gives rise to a federal cause of action[.]" *Id*. (quoting *Hudson*, 503 U.S. at 9-10).

"A claim that a government official has violated the Eighth Amendment by using excessive force has both a subjective and an objective component." *Mustafa v. Corr. Officer Pelletier*, No. 22-2187, 2023 U.S. App. LEXIS 30197, at *3 (2d Cir. Nov. 14, 2023) (summary order). "The objective component relates to the level of physical force used against the inmate and whether that force is repugnant to the conscience of mankind." *Jordan v. Sheehy,* No. 3:11cv1415 (JBA), 2013 U.S. Dist. LEXIS 33267, at *3 (D. Conn. Mar. 11, 2013) (citing *Hudson*, 503 U.S. at 9-10). "[W]ith respect to the subjective component [the inquiry] depends on whether [force] 'was applied maliciously and sadistically to cause harm.'" *Mustafa*, 2023 U.S. App. LEXIS 30197, at *4 (quoting *Wilkins v. Gaddy*, 559 U.S. 34, 39 (2010)). Indeed, "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." *Green v. McLaughlin*, 480 F. App'x 44, 48 (2d Cir. 2012) (quoting

Hudson, 503 U.S. at 7). In making this determination, courts consider factors including 'the need for application of force, the relationship between that need and the amount of force used, the threat reasonably perceived by the responsible officials, and any efforts made to temper the severity of a forceful response.'" *Gawlik v. Semple,* No. 3:20-cv-564 (SRU), 2021 U.S. Dist. LEXIS 184060, at *27 (D. Conn. Sep. 27, 2021) (quoting *Hudson*, 503 U.S. at 7).

"Corrections officers receive 'wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security.'" *Barnes v. Harling*, 368 F. Supp. 3d 573 (W.D.N.Y. 2019) (quoting *Whitley*, 475 U.S. at 321-22 (quoting *Bell v. Wolfish*, 441 U.S. 520, 547 (1979))). "This 'deference extends to a prison security measure taken in response to an actual confrontation,' and 'requires that neither judge nor jury freely substitute their judgment for that of officials who have made a considered choice.'" *Id*. (quoting *Whitley*, 475 U.S. at 322). "Maintaining order and security in a prison is a legitimate penological objective." *Shehan v. Erfe*, No. 3:15-CV-1315 (MPS), 2017 WL 53691, at *9 (D. Conn. Jan. 4, 2017). Further, it is not excessive force, for correction officers to choose between different lawful methods of force. *Id*.

D. Defendants are entitled to qualified immunity.

a. A government official is entitled to qualified immunity so long as his conduct did not violate clearly established law, which means existing precedent of the Supreme Court or Second Circuit must have placed the question beyond debate.

"[A] claim for qualified immunity from liability for damages under § 1983 raises a question of federal law ... and not state law." *Schnabel v. Tyler*, 230 Conn. 735, 742 (1994) (citations omitted; internal quotation marks omitted.) "Therefore, in reviewing ... claims of qualified

immunity we are bound by federal precedent, and may not expand or contract the contours of immunity available to government officials." *Id.* at 743. Therefore, in reviewing these claims of qualified immunity we are bound by federal precedent, and may not expand or contract the contours of the immunity available to government officials. . . . Furthermore, in applying federal law in those instances where the United States Supreme Court has not spoken, we generally give special consideration to decisions of the Second Circuit. . . ." *Miller v. Doe*, 214 Conn. App. 35, 45 (2022) (quoting *Morgan v. Bubar*, 115 Conn. App. 603, 625 (2009)).

"Under federal law, the doctrine of qualified immunity shields officials from civil damages liability for their discretionary actions as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated." *Barone*, 210 Conn. App. at 248 (quoting *Brooks v. Sweeney*, 299 Conn. 196, 216-17, 9 A.3d 347 (2010)). "Qualified immunity is an immunity from suit rather than a mere defense to liability and, therefore, protects officials from the burdens of litigation for the choices that they make in the course of their duties. . . ." *Id*. Since "qualified immunity is not only a defense to liability, but also provides immunity from suit, an important part of its benefit is effectively lost if a case is erroneously permitted to go to trial. . ." *Lynch v. Ackley*, 811 F.3d 569, 576 (2d Cir. 2016). Furthermore, qualified immunity implicates this Court's subject matter jurisdiction. *See Jan G. v. Semple*, 202 Conn. App. 202, 244 A.3d 644, 657 (2021) ("[T]he plaintiff's § 1983 claims asserted against the defendants in their individual capacities are barred on the basis of qualified immunity, and the trial court properly dismissed such claims for lack of subject matter jurisdiction."); *Braham v. Newbould*, supra, 160 Conn. App. 306-307 (affirming dismissal of § 1983 claims on basis of qualified immunity).

Qualified immunity protects a government official from liability if "(1) his conduct [did] not violate clearly established statutory or constitutional rights of which a reasonable person would have known, or (2) it was objectively reasonable for him to believe that his actions were lawful at the time of the challenged act.'" *Simpson v. City of New York*, 793 F.3d 259, 268 (2d Cir. 2015)). Consequently, state officials are shielded by qualified immunity if the court finds that the plaintiff's constitutional rights were not violated; if there was no clearly established constitutional right at issue; or even if clearly established rights were violated, so long as the officers acted reasonably under the circumstances.

This doctrine balances "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, 231 (2009); *Terebesi v. Torreso*, 764 F.3d 217, 230 (2d Cir. 2014). Qualified immunity applies "regardless of whether the government official's error is a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact." *Spavone v. N.Y. State Dep't of Corr. Servs.*, 719 F.3d 127, 135 (2d Cir. 2013) (internal quotation marks omitted) (quoting *Pearson*, 555 U.S. at 565). Thus, qualified immunity "protects all but the plainly incompetent or those who knowingly violate the law." *Id*. at 743 (internal quotation marks omitted).

To overcome qualified immunity, a plaintiff must show that (1) the defendant violated a statutory or constitutional right, and (2) that the right was clearly established at the time of the challenged conduct. *Taylor v. Barkes*, 575 U.S. 822, 825 (2015) (citations omitted). In the qualified immunity context, a right is "clearly established" if, at the time of the challenged conduct,

it is "sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Mullenix v. Luna*, 577 U.S. 7, 11 (2015) (per curiam). "To be clearly established, a legal principle must have a sufficiently clear founding in then-existing precedent [and] [t]he rule must be settled law, which means it is dictated by controlling authority or a robust consensus of cases of persuasive authority." *District of Columbia v. Wesby*, 138 S. Ct. 577, 589-90 (2018). "Only Supreme Court and Second Circuit precedent existing at the time of the alleged violation is relevant in deciding whether a right is clearly established." *Torcivia v. Suffolk Cty.*, 17 F.4th 342, 367 (2d Cir. 2021).

The Supreme Court has recently, and repeatedly, instructed lower courts "not to define clearly established law at a high level of generality." *City of Escondido, Cal. v. Emmons*, 139 S. Ct. 500, 503 (2019) (citation omitted). Rather, "the clearly established law must be 'particularized' to the facts of the case." *White v. Pauly*, 580 U.S. 73, 79 (2017) (citation omitted). The qualified immunity analysis must be "particularized" in the sense that "'[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Doninger v. Neihoff*, 642 F.3d 334, 345-46 (2d Cir. 2011). "The question is not what a lawyer would learn or intuit from researching case law, but what a reasonable person in the defendant's position should know about the constitutionality of the conduct." *Id*. at 345. "This inquiry must be undertaken in light of the specific context of the case, not as a broad general proposition." *Mullenix*, 577 U.S. at 12. "'[S]pecificity is especially important in the' excessive force context because '[i]t is sometimes difficult for an officer to determine how the relevant legal doctrine . . . will apply to the factual situation the officer confronts.'" *Gerard v. City of N.Y.*, 843

F. App'x 380, 382 (2d Cir. 2021) (quoting *Mullenix*, 577 U.S. at 12). "Accordingly, [the court's] inquiry focuses on the specific 'factual situation the officer[s] confront[ed],' and the defendants will be 'entitled to qualified immunity unless existing precedent 'squarely governs' the specific facts at issue.'" *McKinney v. City of Middletown*, 49 F.4th 730, 739 (2d Cir. 2022) (quoting *Kisela v. Hughes*, 138 S. Ct. 1148, 1152-53 (2018)).

The Supreme Court has specifically held that characterizing the right merely as "excessive force" is simply too broad:

> [T]here is no doubt that *Graham v. Connor, supra*, clearly establishes the general proposition that use of force is contrary to the Fourth Amendment if it is excessive under objective standards of reasonableness. Yet that is not enough. Rather, we emphasized in *Anderson* {*v. Creighton*] 'that the right the official is alleged to have violated must have been "clearly established" in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.'. The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.

Brosseau v. Haugen, 543 U.S. 194, 198–99 (2004) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). "Qualified immunity protects officers 'from the sometimes hazy border between excessive and acceptable force.'" *Keene v. Schneider*, 350 F. App'x 595, 596 (2d Cir. 2009) (quoting *Brosseau*, 543 U.S. at 198)).

b. Defendants are entitled to qualified immunity on the excessive force claims because there is no Second Circuit or Supreme Court case holding that prison officials commit excessive force when utilizing the force deployed here on an inmate who has refused compliance with a strip search despite numerous verbal instructions to do so, and physically resisted and struggled with officers while they attempt to complete a controlled strip search.

Plaintiff alleges Defendants Gray, Kacpryzski, Boucher, Rinaldi, Griffin, Guest, Busalacchi, Ginsberg, and Rosado used the following forms of force against Decedent Jones: they "handcuffed Jones," "strip searched him," "subjected Jones to knee and fist strikes to his legs and torso," "covered Jones's face with a universal safety veil," and "subjected [Jones] to pressure on his neck and back." (Doc. 182.00 at ¶¶15-19.) Plaintiff further alleges that "Defendant Gray. . .sprayed oleo capsicum 'pepper spray' directly into Jones's face." (Doc. 182.00 at ¶18.) As a preliminary matter, Defendants Guest, Ginsberg, Rosado, and Rinaldi are all entitled to qualified immunity simply because they did not utilize any of the various forms of force alleged by Plaintiff. But even if this were not so, they along with the Defendants who actually utilized some level of force, are entitled to qualified immunity because each of the various forms of force alleged by Plaintiff have not been found to violate the Eighth Amendment in the particular factual circumstances confronting these officials.

i. Prison officials are well within their rights to utilize restraints and to strip search inmates.

To the extent Plaintiff suggests that Defendants' use of handcuffs when strip searching Decedent was excessive force violating the Eighth Amendment, this borders on frivolous. Courts have consistently recognized that strip searches of inmates are necessary and, unless done for some

illegitimate purpose, do not violate the constitution. *Rosa v. Cook*, No. 3:22CV00703(SALM), 2022 U.S. Dist. LEXIS 134055, at *23 (D. Conn. July 28, 2022) ("courts are generally reluctant to conclude that strip searches—even where an inmate alleges aggressive or inappropriate behavior—rise to the level of objectively serious enough to constitute an Eighth Amendment violation.").[7] Further, "[p]lacing an inmate in handcuffs is not a per se constitutional violation." *Boyd v. Doe*, No. 9:18-CV-1333 (TJM/ATB), 2019 U.S. Dist. LEXIS 68214, at *19 (N.D.N.Y. Apr. 23, 2019); *see also Benitez v. Locastro*, No. 9:04-CV-423 (NAM/RFT), 2010 U.S. Dist. LEXIS 7426, 2010 WL 419999, at *1, *12 (N.D.N.Y. Jan. 29, 2010) (dismissing Eighth Amendment claim based on tight handcuffing where plaintiff failed to "allege for how long the handcuffs and shackles were applied, [ ]or the circumstances of their application").

An Eighth Amendment claim of excessive force based on handcuffs requires "1) the handcuffs were unreasonably tight; 2) the defendants ignored the [plaintiff's] pleas that the handcuffs were too tight; and 3) [there is a] degree of injury to the wrists." *Boyd*, 2019 U.S. Dist. LEXIS 68214, at *19. Here, there is no allegation that Defendants applied handcuffs too tightly and there is absolutely no evidence that Decedent ever complained the cuffs were too tight. Indeed, the video demonstrates Decedent walking while escorted by the officers with ease, and never

[7] *See also Abrams v. Waters*, No. 3:17-CV-1659 (CSH), 2018 WL 2926294, at *5 (D. Conn. June 8, 2018) ("The body of the prisoner must be examined to determine whether weapons or contraband are concealed. However, unless the search is conducted in an unreasonable manner, such as when the officer conducting the search has an intention of humiliating the inmate or deriving sexual arousal or gratification from the contact, the search does not violate the inmate's constitutional rights."); *Walker v. Ponte*, No. 14 CIV. 8507 (ER), 2016 U.S. Dist. LEXIS 110062, 2016 WL 4411415, at *4 (S.D.N.Y. Aug. 18, 2016) ("[C]ourts have acknowledged the degree to which strip searches may humiliate and 'invade the personal privacy of inmates,' and have nonetheless upheld the use of strip searches where they further the legitimate interest of discovering contraband.").

mentioning the handcuffs, let alone complaining of their supposed tightness. In these circumstances, there can be no serious claim that it is clearly established that the application of the handcuffs or the strip search constituted excessive force. Defendants are entitled to qualified immunity on any Eighth Amendment claims based on these actions.

ii. DOC officials have been granted qualified immunity for using a spit veil on an inmate even after the events of this case.

As a preliminary matter, there does not appear to be a single Second Circuit or Supreme Court case that even mentions the use of a "safety" or "spit" veil by correctional officials, much less a case holding that the use of a such a device could constitute excessive force. That alone mandates a grant of qualified immunity as to any claims related to the safety veil. Indeed, the few district court opinions that even mention the use of a spit or safety veil all postdate the events in this case, the earliest coming several months after the events of this case. *See Correa v. McLeod*, No. 3:17-cv-1059 (VLB), 2018 U.S. Dist. LEXIS 242249, at *5 (D. Conn. June 4, 2018) (noting "DOC staff also placed a 'spit veil' on the plaintiff.").

Two years after the events of this case, Chief Judge Shea granted qualified immunity to DOC officials who utilized a spit veil on an inmate who was also handcuffed and upon whom chemical agent had been deployed three times. *See Baltas v. Rivera*, No. 3:19-cv-1043 (MPS), 2020 U.S. Dist. LEXIS 196274, at *44-45 (D. Conn. Oct. 22, 2020). The court noted "there are no reported cases in this circuit finding a constitutional right preventing [the] use [of a spit veil] or holding the use of a spit veil constitutes excessive force." *Id*. The existence of this case and this holding makes denial of qualified immunity here impossible because even though a district court decision is incapable of clearly establishing law for purposes of qualified immunity—see *Liberian*

Cmty. Ass'n of Conn. v. Lamont, 970 F.3d 174, 189 (2d Cir. 2020)—a district court decision is certainly sufficient to demonstrate that the law is not clearly established. *See Peoples v. Leon*, 63 F.4th 132, 143 (2d Cir. 2023) (citing split among district courts as reason law was not clearly established for purposes of qualified immunity); *Gill v. DeFrank*, 8 F. App'x 35, 37 (2d Cir. 2001) (affirming grant of qualified immunity to prison officials on inmate claim citing "disagreement among district courts" as evidence that the law was not "clearly established"). No one could credibly argue that it was or is clearly established that using a spit veil on an inmate constitute excessive force. Therefore, Defendants are entitled to qualified immunity on any such claim.

iii. Neither the Supreme Court nor the Second Circuit has ever addressed prone restraint or positional asphyxiation in the Eighth Amendment context.

As is the case with the spit veil, neither the Supreme Court nor the Second Circuit has held that putting "pressure" on an inmate's back or neck necessarily constitutes excessive force pursuant to the Eighth Amendment. It appears the Second Circuit has not addressed this at all. The closest the Supreme Court has come was in 2021, when—in the Fourteenth Amendment context dealing with a pretrial detainee—it vacated a holding by the Eighth Circuit that six police officers did not commit excessive force by holding the detainee down while he was handcuffed and shackled by his limbs, shoulders, biceps, and legs while "[a]t least one other placed pressure on [his] back and torso." *Lombardo v. City of St. Louis*, 141 S. Ct. 2239, 2240 (2021). After 15 minutes in this position, and after the detainee told the officers to "stop" and that "it hurts," he died. *Id*.

Lombardo is instructive on whether "prone restraint" or "so-called "positional asphyxiation" was a clearly established form of excessive force pursuant to the Eighth Amendment in 2018. First, *Lombardo* was a Fourteenth Amendment case, so the ultimate inquiry was whether the force applied was "objectively unreasonable," not whether the force was "sadistic and malicious." *See Kingsley v. Hendrickson*, 576 U.S. 389, 397, 400 (2015).

Second, the Supreme Court did not actually deny the officers qualified immunity in *Lombardo* or hold that use of prone restraint was or could be a clearly established violation of the Fourteenth Amendment. Rather, the Court expressed concern as to whether the Eighth Circuit properly applied the *Kingsley* factors. The Court specifically left open the question of excessive force and qualified immunity, stating "[w]e express no view as to whether the officers used unconstitutionally excessive force or, if they did, whether [the detainee's] right to be free of such force in these circumstances was clearly established at the time of his death. We instead grant the petition for certiorari, vacate the judgment of the Eighth Circuit, and remand the case to give the court the opportunity to employ an inquiry that clearly attends to the facts and circumstances in answering those questions in the first instance." *Lombardo*, 141 S. Ct. at 2242.

Third, the Eighth Circuit's decision in *Lombardo*, released in 2020, demonstrates that there was at least a debate among judges[8] as to whether prone restraint of a resisting but handcuffed and shackled pretrial detainee constitutes excessive force under the Fourteenth Amendment. *See Lombardo v. City of St. Louis*, 956 F.3d 1009, 1013 (8th Cir. 2020) ("This Court has previously

[8] *See Wilson v. Layne*, 526 U.S. 603, 618 (1999) ("If judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy.").

held that the use of prone restraint is not objectively unreasonable when a detainee actively resists officer directives and efforts to subdue the detainee."); *see also Ryan v. Armstrong*, 850 F.3d 419, 428 (8th Cir. 2017) (finding no "objectively unreasonable application of force" where officers placed body weight on a detainee while he was in his cell and on the ground in a prone position and deployed a taser in drive stun mode on two occasions ultimately leading to his death).

Fourth, *Lombardo* was released three years after the events in this case occurred. Even if *Lombardo* was about the Eighth Amendment, and even if it did rule definitively on the question of prone restraint, it still would not have been enough to clearly establish the law for these Defendants.

There is simply no Supreme Court or Second Circuit case holding that placing one's body weight or less on an inmate in the prone position constitutes excessive force. Defendants are entitled to qualified immunity on this claim.

iv. It is not clearly established whether use of pepper spray on an uncooperative inmate constitutes excessive force.

It may be clearly established that the "use pepper spray gratuitously against a restrained and unresisting arrestee" constitutes excessive force. *Tracy v. Freshwater*, 623 F.3d 90, 99 n.5 (2d Cir. 2010). However, "it is not clearly established that pepper spraying an uncooperative inmate is unlawful." *Ismael*, 2020 U.S. Dist. LEXIS 124292, at *28. In *Ismael*, the defendants tried to put the plaintiff in a cell, and he refused to enter, so a defendant officer used OC Spray on the plaintiff. *Id*. at *5-6. The court granted qualified immunity, noting "[the plaintiff] did not physically resist or threaten any of the officers before [the defendant] pepper sprayed him. But he disobeyed multiple direct orders. Plaintiff has not cited—and the Court has not unearthed—any

case with similar facts, much less any Second Circuit or Supreme Court case. Thus, even if [the defendant] violated [the plaintiff's] Eighth Amendment rights by pepper spraying him (an issue the Court does not decide), that right was not clearly established." *Id*. at *30.

As was the case with *Baltas* and the spit veil, *Ismael* mandates a grant of qualified immunity on any claim related to the use of pepper spray because there is at least a split in the district courts of the Second Circuit on this issue, demonstrating a lack of clearly established law. *See Peoples*, 63 F.4th at 143; *Gill*, 8 F. App'x at 37.

v. The use of knee and fist strikes on an uncooperative inmate who has ignored multiple verbal orders is not a clearly established Eighth Amendment violation.

Here, Defendant Boucher utilized a single knee strike when Decedent repeatedly refused to squat and cough during the strip search and while he was actively resisting Defendants' efforts to get him down on the bed. Ex. A, 11:11. Later, Defendant Kacprzyski deployed three knee strikes to Decedent's torso approximately ten seconds after he abruptly stood up an struggled against Defendants' efforts to get him back to the bed. Ex. A, 12:32-44. Again, Decedent was actively resisting and shouting when this happened.

As former Chief Judge Underhill held "there are no Supreme Court or Second Circuit cases holding that knee strikes, in and of themselves, constitute excessive force." *Gulley v. Limmer*, No. 3:18-cv-941 (SRU), 2020 U.S. Dist. LEXIS 68758, at *15 (D. Conn. Apr. 20, 2020). In *Gulley*, the inmate plaintiff refused to comply with multiple orders to squat and cough during a controlled strip search. *Id*. at *10. Though the court noted the plaintiff "was not exhibiting violent behavior" and was "surrounded by three officers, with his hands cuffed behind his back," the defendants

were still granted qualified immunity. *Id*. at *9. Again, cases like *Gulley* that postdate the events here, foreclose a finding that the use of knee strikes during a strip search on an uncooperative, yet restrained inmate after multiple verbal orders went ignored was clearly violative of the Eighth Amendment. *See also Bennett v. Britton*, 609 F. App'x 11, 14 (2d Cir. 2015) (summary order) (Police officer's use of peroneal nerve strike on arrestee's thigh to incapacitate him was objectively reasonable under the less exacting Fourth Amendment excessive force standard).

After Decedent had abruptly stood to his feet and Defendants were struggling to get him back down to the bed, Defendant Griffin attempted to place leg irons on Decedent. Ex. A, 14:02-22. As Defendant Griffin bent down towards Decedent's legs, he continued to resist and Defendant Griffin delivered a fist strike to Decedent's thigh in order to gain compliance. Later, Defendant Griffin again deployed fist strikes to Decedent's thigh when he began flailing his leg and kicking. Ex. A, 19:59.

"Much like the use of pepper spray, with respect to the use of strikes or blunt force, courts in the Second Circuit have drawn a distinction between using such force to quell active resistance to arrest and using such force on a non-resisting or compliant arrestee, the former tending to be constitutionally permissible." *Bradley v. Bongiovanni*, No. 18-CV-6823-FPG, 2021 U.S. Dist. LEXIS 155044, at *25-27 (W.D.N.Y. Aug. 17, 2021); *see Tracy v. Freshwater*, 623 F.3d 90, 96 (2d Cir. 2010) (no excessive force under the more exacting Fourth Amendment standard where officer tackled fleeing arrestee and struck him multiple times with a metal flashlight); *Husbands v. City of New York*, 335 F. App'x 124, 129 (2d Cir. 2009) (summary order) (officer's punch to arrestee's torso was not excessive force because it "was necessary to subdue [the arrestee] and

apply handcuffs"); *Gutierrez v. New York*, No. 18-CV-3621, 2021 U.S. Dist. LEXIS 33013, 2021 WL 681238, at *15 (E.D.N.Y. Feb. 22, 2021) (collecting cases and concluding that "tackling or shoving a plaintiff down to the ground can be an objectively reasonable response to a plaintiff resisting arrest").

As the Western District of New York noted in *Bradley*, "[a]t most, the Court can discern from the case law that an officer may use some degree of force to quell resistance to arrest, and said case law provides a general architecture for assessing the reasonableness of force in that context. More is required to overcome qualified immunity, however." *Bradley*, 2021 U.S. Dist. LEXIS 155044, at *25-27 (W.D.N.Y. Aug. 17, 2021) (citing *City of Escondido, Cal. v. Emmons*, 139 S. Ct. 500, 504 (2019) (stressing the "need to identify a case where an officer acting under similar circumstances was held to have violated the Fourth Amendment")). Again, this is true even under the more exacting Fourth Amendment standard. It therefore cannot be said that the use of a handful of fist strikes to an actively resisting and noncompliant inmate's thigh constitutes excessive force for purposes of the Eighth Amendment. Given the facts and circumstances here, Defendants are entitled to qualified immunity.

c. Defendants are entitled to qualified immunity on the deliberate indifference claims.

As articulated *supra*, Plaintiff's entire theory on deliberate indifference seems to hinge on the premise that Defendants should have recognized Decedent was in medical distress. Such a theory runs headfirst into a wall of contrary authority. *See Wortham v. Plourde*, No. 3:12-cv-1515 (DJS), 2014 U.S. Dist. LEXIS 123896, at *7 (D. Conn. Sep. 5, 2014) ("The fact that a prison official did not alleviate a significant risk that he should have, but did not, perceive does not

constitute deliberate indifference to a serious medical need.") (citing *Farmer*, 511 U.S. at 838). Indeed, there appear to be no case from the Second Circuit or the Supreme Court holding that prison officials are deliberately indifferent when they fail to have a particular LCSW attend a controlled strip search of an inmate or when they only have medical staff check on a noncompliant inmate half a dozen times or when they do not immediately give drugs to an inmate they were incapable of providing. It cannot be seriously contended that these Defendants in these circumstances, violated some clearly established right, especially the custody Defendants who correctly relied on medical staff. *Shand v. Conn. Dep't of Corr.*, No. 3:21-CV-523 (SVN), 2022 U.S. Dist. LEXIS 29407, at *27 (D. Conn. Feb. 18, 2022) ("Indeed, as non-medical staff, these defendants were entitled to rely on the medical care provided by the medical staff."); *see also Siminausky v. Sean*, No. 3:14-cv-243(VLB), 2017 U.S. Dist. LEXIS 10188, 2017 WL 391425, at *4 (D. Conn. Jan. 24, 2017) (non-medical professionals and correctional officers entitled to rely on opinions and treatment of medical staff); *Cerilli v. Cay*, No. 3:14-cv-1551(AWT), 2015 U.S. Dist. LEXIS 99236, 2015 WL 4603460, at *2 (D. Conn. July 29, 2015) (noting custodial staff have no ability to provide medical care).

It is for these same reasons that even if Plaintiff could argue Defendants violated some clearly established right, Defendants would still be entitled to qualified immunity because their actions were objectively reasonable. As articulated supra, Lt. Gray almost immediately enlisted the aid of medical staff and continued to do so throughout the encounter. Even towards the end of the incident when Decedent's breathing slowed and he stopped shouting as loudly, the actions of Defendants were objectively reasonable given they believed Decedent was simply feeling the

effects of the sedatives they believed had been properly provided. No matter how one looks at it, Defendants are entitled to qualified immunity and therefore judgment.

E. Nurse Rosado is entitled to judgment because she was not personally involved in any constitutional violation.

"In order to state a claim for damages under section 1983, the plaintiff must demonstrate the defendant's direct or personal involvement in the actions which are alleged to have caused the constitutional deprivation." *Roque v. Armstrong*, 392 F. Supp. 2d 382, 388 (D. Conn. 2005) (citing *Gill v. Mooney*, 824 F.2d 192, 196 (2d. Cir. 1987)); *see also Brown v. Rotenberg*, 268 F. Supp. 3d 445, 450 (W.D.N.Y. 2017), *appeal dismissed sub nom. Brown v. Koslow*, No. 17-2499, 2017 WL 7542534 (2d Cir. Dec. 21, 2017) ("A claim which fails to demonstrate a defendant's personal involvement in the alleged constitutional deprivation is subject to sua sponte dismissal.").

The plaintiff, however, may not rely on a special test to establish a defendant's liability, but rather "must . . . prove the elements of the underlying constitutional violation *directly* against the official without relying on a special test for supervisory liability." *Tangreti v. Bachmann*, 983 F.3d 609, 620 (2d Cir. 2020) (emphasis added). In other words, the plaintiff must establish not just that the defendants were aware of an alleged constitutional violation, or that a constitutional violation was committed by subordinates—rather, "[t]he violation must be established against the supervisory official *directly*." *Id*. (emphasis added). The focus is on what the supervisor did or caused to be done, "the resulting injury attributable to his conduct, and the *mens rea* required of him to be held liable, which can be no less than the *mens rea* required of anyone else." *Id.* at 618. In addition, a plaintiff must allege facts to demonstrate an affirmative causal link between the action of the official and the plaintiff's injury. *See Poe v. Leonard*, 282 F. 3d 123, 140 (2d Cir.

2002). In short, "a plaintiff must plead and prove 'that each Government-official defendant, *through the official's own individual actions*, has violated the constitution.'" *Gray v. Lamont*, No. 3:21-CV-143 (VAB), 2021 U.S. Dist. LEXIS 96779, at *10 (D. Conn. May 21, 2021) (quoting *Tangreti*, 983 F.3d at 618) (emphasis added).

Here, Nurse Rosado was not personally involved in any constitutional violation.[9] As discussed above, Plaintiff's claims focus on the Defendants' failure to recognize Mr. Jones's medical condition throughout the course of their approximately 30-minute encounter with him. Nurse Rosado, however, was not present for the majority of that interaction. Instead, Nurse Rosado, who was the assigned nurse to Mr. Jones's housing unit, had walked with Mr. Jones from his housing unit to the IPM in the event she could provide additional assistance. See Ex. I. It is undisputed that Mr. Jones was not exhibiting any signs of medical distress during this transport and the taking of his vitals, which occupies the first approximately seven minutes of the video. Ex. A, 00:01-06:26; Ex. C, Ex. D. Upon arrival to the IPM, Rosado was not in cell 520 but remained nearby with other officials at the "bubble," when shortly thereafter she "heard a chanting sound and a commotion." Ex. B, Pgs. 527-529. Lt. Gray then asked if the medical staff could assist and get Mr. Jones "something." Id.; Ex. A, 07:24. After this, Nurse Rosado left the area, called the on-call psychiatrist, Dr. Tung, to authorize injections. Ex. B, Pgs. 527-529. She remains off-screen,

[9] As discussed above, Plaintiff's complaint is unclear as to whether it asserts an excessive force claim. To the extent any claims or allegations brought against Nurse Rosado are based upon use of force, such claims are without merit as Nurse Rosado—who is incorrectly identified as an "officer" in the Complaint (See Doc. 184.00)—did not apply force and had no involvement whatsoever in any use of restraints, OC spray, or other type of force.

out of the area, talking with Dr. Tung for several minutes. At some point, she returned, again outside the cell and outside hearing or viewing distance. Ex. I, Pgs. 37-41.

At 13:46 on the video, Lt. Gray steps out and asks medical to obtain an order for full therapeutic restraints for Mr. Jones. Nurse Rosado then left the area again to call Dr. Tung a second time to obtain such an order. Ex. B, Pgs. 527-529. She did so, and when she returned, she heard an officer telling Mr. Jones to stand up, and that Mr. Jones would need to be decontaminated, which occurs at 23:33 on the video. Id.; Ex. A. At this point, Mr. Jones is no longer audibly breathing, coughing, yelling, or struggling. There are no objective sounds that would make it obvious to Nurse Rosado that anything was wrong; and she had not been present for the past ten or so minutes of video. Nurse Rosado then went to get cloths from another area of the unit to decontaminate Mr. Jones. Ex. I, Pg. 40. Shortly thereafter, both she and Nurse Ginsberg enter cell 514, begin assessing Mr. Jones, begin to realize his condition, and start life saving measures. Ex. A, 24:00-27:55. This is the extent of Nurse Rosado's involvement. See Ex. I.

At no time during this interaction was Nurse Rosado deliberately indifferent to any risk to Mr. Jones'ss medical needs nor was she involved in any use of force. During the few times she was physically present and able to see Mr. Jones, he appeared calm and quiet, and not at obvious risk of any medical issues. Those few times she was within hearing distance of the cell, Nurse Rosado was only nearby—without any visibility of Mr. Jones in the cell—for a brief interlude while Mr. Jones was struggling, shouting, and chanting at about 13:46 on the video. Ex. I, Pgs. 37-41. During the remainder of the time, she was doing exactly what Plaintiff claims she should have been doing: getting Mr. Jones medical care through Dr. Tung, or directly providing emergency

lifesaving measures. And even Plaintiff's experts do not fault Nurse Rosado for her actions: neither of Plaintiff's medical experts have any opinion on her actions, other than that Dr. Simopolous approves of 1.) obtaining medications for calming Mr. Jones and 2.) use of therapeutic restraints—both of which Nurse Rosado facilitated here. See Ex. E; Ex. C; Ex. D.

Ultimately, Nurse Rosado's involvement was extremely limited. Indeed, the few actions she did take were held out to be appropriate by Plaintiff's own expert. She cannot be held liable in the absence of her personal involvement in some constitutional violation, and here, there is none. Judgment should enter in her favor on all claims.

F. Defendants are entitled to judgment on the failure to intervene claims.

"[P]rison officials can be held liable under section 1983 "for failing to intervene in a situation where another official is violating an inmate's constitutional rights, including the use of excessive force, in their presence. Liability for failure to intervene can arise where a prison corrections officer fails to prevent another corrections officer from committing a constitutional violation if (1) the officer had a realistic opportunity to intervene and prevent the harm; (2) a reasonable person in the officer's position would know that the victim's constitutional rights were being violated; and (3) the officer does not take reasonable steps to intervene." *Ibbison v. Quiros*, Docket No. 3:22-CV-01163 (SVN), 2023 U.S. Dist. LEXIS 18255, at *30 (D. Conn. Feb. 3, 2023). One of the elements of failing to intervene is that "a reasonable person in the officer's position would know that the victim's constitutional rights were being violated." *Ibbison,* supra. Additionally, the Second Circuit noted that in a failure to intervene claim, if the original action is

covered by qualified immunity, then the failure to intervene is likewise covered. *Crawford v. Cuomo*, 721 F. App'x 57, 60 n.2 (2d Cir. 2018).

Here, as discussed above, Plaintiff's claims for deliberate indifference fail as a matter of law and are barred by qualified immunity. Plaintiff's excessive force claims are also barred by qualified immunity. For these reasons, Defendants are also entitled to judgment as a matter of law on Plaintiff's failure to intervene claims arising out of those alleged violations.

III. CONCLUSION

The Defendants respectfully request the Court grant this motion and issue judgment in their favor for all the foregoing reasons.

THE DEFENDANTS
SCOTT SEMPLE, et al.

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CERTIFICATION

This is to certify that a copy of the foregoing has been mailed and emailed, this day, March 5, 2024 to:

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Exhibit A

Video to be provided to court pursuant to protective order.

Superior Court Clerk's Office
95 Washington Street
Hartford, CT 06106
Attn: Emily

Sent via facsimile

September 27, 2024

Re: *Richardson v. Semple*; HHD-CV-18-6098918-S –
Court Records Request

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To the Clerk:

I write to request a copy of Exhibit A to the defendants' memorandum in support of summary judgment (DKT #193.00) in *Richardson v. Semple*; HHD-CV-18-6098918-S. Because Exhibit A is a video currently on a physical disc I am prepared to come down to the clerk's office with my laptop in order to obtain a copy of the exhibit.

Yours sincerely,

Grace Sinnott
Senior Paralegal
gsinnott@acluct.org
(203) 964-7234

SUPERIOR COURT
STATE OF CONNECTICUT
JUDICIAL DISTRICT OF HARTFORD
95 WASHINGTON STREET
HARTFORD, CONNECTICUT 06106

CHAMBERS OF
HON. LISA MORGAN
PRESIDING JUDGE, CIVIL DIVISION

TELEPHONE: (860) 548-2854
FAX: (860) 548-2887
Lisa.Morgan@jud.ct.gov

October 4, 2024

American Civil Liberties Union Foundation, Connecticut
Attn: Grace Sinnott, Senior Paralegal
765 Asylum Avenue
Hartford, CT 06105

Re: Richardson v Semple; HHD-CV-186098918S

Dear Ms. Sinnott:

Your request for a copy of Exhibit A to the defendants' memorandum in support of summary judgment filed in the above-referenced action (Docket Entry No. 193.00) was forwarded to my attention.

The referenced exhibit is under seal pursuant to a protective order issued by the court on November 13, 2019 (Docket Entry Nos. 115.00 and 115.86). At a hearing held on September 20, 2024, the plaintiff's counsel notified the court of his intent to seek an order vacating the protective order. The court entered a scheduling order with respect to the anticipated motion to vacate (Docket Entry No. 203.00). Pursuant to the court's order, the motion to vacate is due to be filed not later than today with a briefing schedule through October 25, 2024. Unless and until such time as the protective order is vacated or modified, your request for a copy of Exhibit A must be denied.

Sincerely,

Hon. Lisa K. Morgan

List of Parties

- **Plaintiffs:**
  - Lynette Richardson, Administratrix for the Estate of J'Allen Jones and Individually
    - A. Paul Spinella
      Spinella & Associates
      One Lewis Street
      Hartford, CT 06103
      Tel: (860) 728-4900
      Fax: (860) 728-4909
      E-mail: attorneys@spinella-law.com
      Juris #: 413617
    - Ron Murphy
      Advocates Law Firm, LLC
      6 Vine Hill Rd
      Farmington, CT 06032
      Tel.: (860) 678-1900
      Fax: (860) 348-1943
      E-mail: Murphy@AdvocatesLawFirm.com
      Juris #: 302029
  - Jessica Jones
    - A. Paul Spinella
    - Ron Murphy
- **Defendants:**
  - Anthony Kacpryski, Correctional Officer at Garner, CI, in his Individual Capacity
    - Janelle R. Medeiros
      Assistant Attorney General
      165 Capital Ave
      Hartford, CT 06106
      Tel: (860) 808-5450
      Fax: (860) 808-5591
      E-mail: Janelle.medeiros@ct.gov
      Juris #: 439341
    - James M. Belforti
      Assistant Attorney General
      165 Capital Ave
      Hartford, CT 06106
      Tel: (860) 808-5450
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E-mail: james.belforti@ct.gov
Juris #: 438739

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  Assistant Attorney General
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  Hartford, CT 06106
  Tel: (860) 808-5450
  Fax: (860) 808-5591
  E-mail: terrence.oneill@ct.gov
  Juris #: 412261

- Gregory Boucher, Correctional Officer at Garner, CI, in his Individual Capacity
  - Janelle R. Medeiros
  - James M. Belforti
  - Terrence M. O'Neill
- Gray, Correctional Officer at Garner, CI, in his/her Individual Capacity
  - Janelle R. Medeiros
  - James M. Belforti
  - Terrence M. O'Neill
- Rinaldi, Correctional Officer at Garner, CI, in his/her Individual Capacity
  - Janelle R. Medeiros
  - James M. Belforti
  - Terrence M. O'Neill
- Busalacchi, Correctional Officer at Garner, CI, in his/her Individual Capacity
  - Janelle R. Medeiros
  - James M. Belforti
  - Terrence M. O'Neill
- Guest, Correctional Officer at Garner, CI, in his/her Individual Capacity
  - Janelle R. Medeiros
  - James M. Belforti
  - Terrence M. O'Neill
- Rosado, Correctional Officer at Garner, CI, in his/her Individual Capacity
  - Janelle R. Medeiros
  - James M. Belforti
  - Terrence M. O'Neill
- Ginsburg, Correctional Officer at Garner, CI, in his/her Individual Capacity
  - Janelle R. Medeiros
  - James M. Belforti
  - Terrence M. O'Neill

- Griffin, Correctional Officer at Garner, CI, in his/her Individual Capacity
  - Janelle R. Medeiros
  - James M. Belforti
  - Terrence M. O'Neill

Judges participating in the case:

- Hon. Cesar Noble
- Hon. David Sheridan
- Hon. Susan Cobb
- Hon. Claudia Caio
- Hon. Lisa Morgan (Issued the denial of the Court Records Request at issue)

Attorney/Firm : DAN BARRETT (437438) **Email: dbarrett@acluct.org** **Logout**

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