IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION
AT DAYTON

JOSEPH GUGLIELMO	:	**Case No. 3:17-cv-6**
	:	
Plaintiff,	:	
	:	**Judge Thomas M. Rose**
vs.	:	
	:	
	:	**Magistrate Judge Ovington**
MONTGOMERY COUNTY, OHIO and THE MONTGOMERY COUNTY BOARD OF COMMISSIONERS, et al.,	:	
	:	
Defendants.	:	
	:	

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Sgt. Matthew Snyder repeatedly struck Mr. Guglielmo in the head and face for more than forty seconds when Mr. Guglielmo posed no threat of harm to him or anyone else. Sgt. Snyder was 16 years younger and 60 pounds heavier than Mr. Guglielmo and had three corrections officers standing around him witnessing the assault. None of them made any move to assist Sgt. Snyder or protect Mr. Guglielmo. Mr. Guglielmo's only offense was banging on his cell door, which was typical in the jail. And when Sgt. Snyder told him to stop banging, Mr. Guglielmo complied. There was no legitimate reason for Sgt. Snyder to even enter Mr. Guglielmo's cell. He was only there to punish Mr. Guglielmo. Five minutes before the assault, he announced to his subordinates that he was going to "beat that crazy fucker's ass." And once inside the cell, Sgt. Snyder intentionally made Mr. Guglielmo angry by calling him a faggot. Sadly, this was not an isolated incident. In the prior 14 months, Sgt. Snyder had entered four different inmates' cells after they complied with his commands to stop banging and then assaulted them. This was just the way he operated. These incidents were reported and no one at Montgomery County did anything to stop him. If they had, Mr. Guglielmo may still be deejaying for ecstatic crowds, instead he is wearing diapers in a nursing home, paralyzed on the left side of his body.

I. FACTS

Defendant Matthew Snyder hated working in the Montgomery County jail. (Snyder Dep., RE 107, PageID#2259:13-2260:1). "It's a terrible environment to breath in, to work in all day." (*Id.*). He hated it so much that two weeks after beating Joseph Guglielmo into a coma, he voluntarily demoted himself from sergeant to deputy and left the jail for road patrol.[1] (Snyder Dep., RE 107, PageID#2258:18-2265:4; 2065:18-2066:14).

[1] For the purposes of this brief, he will be referred to as Sgt. Snyder as that was his rank at the time he used force on Mr. Guglielmo.

On January 15, 2015, Sgt. Snyder stood before the on-coming first shift officers at 11:30 p.m. and led roll call. (Snyder Dep., RE 107, PageID#2113:12-17). He was the booking Sergeant. (Snyder Dep., RE 107, PageID#2114:1-6). He was in charge of the first floor of the jail. (Snyder Dep., RE 107, PageID#2068:2-12).

The first floor includes an area called transport staging, mostly used in the morning for inmates who are being taken to court or prison. (Sears Dep., RE 109, PageID#2452:17-21). At night though, when there are no inmates leaving the facility, the transport staging area is sometimes used to hold disruptive inmates – it is an isolated area where they can make noise without disturbing other inmates. (Banks I Dep., RE 48-1, PageID#301:8-302:10).

The transport staging area is separated from the booking sergeants' office by nothing more than a window. (Snyder Dep., RE 107, PageID#2186:10-2187:25; Ex. 45, Platform Photo). So, if an inmate in transport staging bangs on his cell door, the booking sergeant, sitting at his desk, would have to listen to the banging as long as it lasts. And every night "somebody is yelling or pounding on a cell door all the time." (Banks I Dep., RE 48-1, PageID#302:11-17).

Mr. Guglielmo was in a cell in the transport staging area – the only inmate there. (Whalen Dep., RE 110, PageID#2714:5-21). It was 11:30 p.m., the lights were on, he had no bed, and he could not see any corrections officers on the platform because the platform window was tinted. (Ort Dep., RE 113, PageID#3010:5-7, 3013:5-17; Sears Dep., RE 109, PageID#2455:19-2456:1; Ex. 44, View from Cell Photo). He wanted medical care and he had not seen a corrections officer since he had been dumped in transport staging nearly an hour earlier; so, he began knocking on the cell door. (Video, MCJ 04_CAM 11, RE 119 22:36:30-23:33:28 (knocking begins at 23:28:38)).[2] When no one came, his knocking transformed to

[2] Defendants manually filed two videos as part of Doc. 119 with file names beginning with MCJ_CAM 11. One is a shorter clip pulled from the longer version. Throughout this brief, Plaintiff's citations to Video, MCJ 04_CAM 11

banging and it grew louder and louder over the next five minutes, until someone finally paid attention. (*Id.*).

Sgt. Snyder led roll call just outside the booking sergeant's office. (Feehan Dep., RE 117, PageID#3488:9-18). As Sgt. Snyder spoke about various things going on in the jail he was interrupted by Mr. Guglielmo banging on his cell door and screaming. (Feehan Dep., RE 117, PageID#3489:1-14; Sears Dep., RE 109, PageID#2519:4-17). After being interrupted a few times, Sgt. Snyder got visibly upset. (Banks II Dep., RE 60-1, PageID#559:9-22). He was red in the face, biting his lip, and then "[Snyder] made a comment to the effect of after roll call, we're going to go back there and beat that crazy fucker's ass." (Feehan Dep., RE 117, PageID#3489:15-21; Snyder Dep., RE 107, PageID#2162:22-24; Banks I Dep., RE 48-1, PageID#314:9-18; Banks II Dep., RE 60-1, PageID#559:9-22).

Within five minutes of making this threat, Sgt. Snyder finished roll call,[3] walked into the booking sergeants office to get a can of pepper spray, gathered five other corrections officers to go to Mr. Guglielmo's cell, and told Sgt. Feehan to get a handheld camera. (Snyder Dep., RE 107, PageID#2124:23-2125:3; Feehan Dep., RE 117, PageID#3489:22-25, 3491:12-19). Sgt. Snyder asked for a camera because he thought this was a situation that could end in a use of force. (Snyder Dep., RE 107, PageID#2149:5-16). Policy required a sergeant to use a handheld camera to record incidents that could lead to potential uses of force. (Ex. 11, Security Equipment Policy, MC-000775).

Before going to the cell, Defendant Deputy Sears explained to Sgt. Snyder that he had dealt with Mr. Guglielmo during the previous shift and that Mr. Guglielmo was causing a

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refers to the full version entitled as MCJ 04_CAM 11 - 1119 TRANSPORT STAGING_20150115222500_20150115235958_8092242 (the document size is 146,214 KB).

[3] Despite the interruptions, Snyder was able to complete roll call, sharing the information that needed to be shared and passing out shift assignments. (Chmiel Dep., RE 116, PageID#3393:16-3394:3).

disturbance because he wanted his medication. (Sears Dep., RE 109, PageID#2521:16-2523:17). Sears told Sgt. Snyder that Mr. Guglielmo had already been told med pass would happen in the morning. (*Id*.). When Sgt. Snyder said he still wanted to go to Mr. Guglielmo's cell, Sears said, "I don't know if you're going to be able to talk to him. He's already been explained it two or three times, I don't know if you're going to get anything through to him." (Sears Dep., RE 109, PageID#2523:9-15). Sergeant Whalen, who had also dealt with Mr. Guglielmo on the prior shift, intercepted the group on their way to the cell, and told them "he'll settle down, just give him time, he'll settle down." (Whalen Dep., RE 110, PageID#2736:11-20). Sgt. Snyder ignored Sgt. Whalen's advice.

As the group left for the cell, Sergeants Banks and Feehan stayed behind. Sgt. Banks said to Sgt. Feehan, "I'm not going back there and getting involved in that." (Banks I Dep., RE 48-1, PageID#321:21-322:9). Feehan responded, "No, I don't want anything to do with it." (*Id.*). Sgt. Banks had a premonition something bad was going to happen. (*Id.*). This premonition was well-founded - Sgt. Snyder had a reputation of being aggressive, having a temper, and being "kind of crazy… just a little unstable at times." (Vitali Dep., RE 71, PageID#905:12-22). He "was very confrontational," operated "in the gray" and "[did]n't follow policies and procedures." (Banks II Dep., RE 60-1, PageID#513:17-515:22). "He liked to show people who was in charge." (*Id*.).

Sgt. Snyder testified his plan was to "see why [Guglielmo] was banging and see if we could make him stop." (Snyder Dep., RE 107, PageID#2117:20-2118:4). When Sgt. Snyder arrived at Mr. Guglielmo's cell door, Mr. Guglielmo stopped banging. (Snyder Dep., RE 107, PageID#2152:2-4). Deputy Sears urged Sgt. Snyder not to enter the cell but to just talk to Mr. Guglielmo through the door, or to open the food port so he could hear better. (Sears Dep., RE

109, PageID#2574:16-2575:7; Ex. 6, Sears Interview Transcript, p. 8-9). Sgt. Snyder ignored Sears. Sgt. Snyder ordered Mr. Guglielmo to step back from the door and Mr. Guglielmo complied. (Snyder Dep., RE 107, PageID#2152:5-7; Def. Mot. S. Judg., RE 123, PageID#3987). Then Sgt. Snyder asked Defendant corrections officer Zachary Zink to open the cell door. (Zink Dep., RE 115, PageID#3289:20-24).

Defendant officers Zachary Zink, Brandon Ort, and, eventually, Matthew Sears followed Sgt. Snyder into the cell, but they all testified that there was no reason to enter the cell. (Zink Dep., RE 115, PageID#3293:1-7; Ort Dep., RE 113, PageID#3020:3-8; Sears Dep., RE 109, PageID#2531:18-21; Cohn Dep., RE 114, PageID#3138:20-3139:12). Mr. Guglielmo was calm, and when an inmate is calmed down, there is no reason to go into a cell. (Sears Dep., RE 109, PageID#2531:12-21; Whalen Dep., RE 110, PageID#2709:25-2710:5). Sgt. Snyder knew that Mr. Guglielmo wanted his medications and to go to the V.A, and entering Mr. Guglielmo's cell, "didn't fix his issue." (Snyder Dep., RE 107, PageID#2152:15-24). Sgt. Snyder entered the cell anyway.[4]

Sgt. Snyder did not wait for Sgt. Feehan to bring the handheld camera to the cell or otherwise secure a camera, so there is no video showing exactly what happened in the cell, but witness testimony, medical evidence, and the security footage of the cell door tells the chilling story of what happened next. (Feehan Dep., RE 117, PageID#3497:19-24).

[4] Sgt. Snyder testified that he entered the cell because he had developed a good "rapport" with Guglielmo by having a "brief" conversation with Guglielmo the previous night. (Snyder Dep., RE 107, PageID#2125:16-24; 2225:11-17). In truth, there was no rapport. At the outset of their conversation in the cell, Snyder testified that "I don't think he recognized me," and then Snyder had to repeat the same conversation they had the night before and only then Snyder testified that "I think he remembered." (Snyder Dep., RE 107, PageID#2126:9-17, 2166:10-14). If Snyder doubted Guglielmo even remembered him, then there is no way he could think he had developed a good rapport with Guglielmo.

Sgt. Snyder entered the cell and told Mr. Guglielmo to sit on a bench to the right of the door, which was out of view of security cameras.[5] Mr. Guglielmo complied and sat down. (Snyder Dep., RE 107, PageID#2125:25-2126:2; Video MCJ_04 Cam 11, RE 119, 23:35:00). Defendant Officers Zink and Ort entered the cell behind Sgt. Snyder. (Zink Dep., RE 115, PageID#3295:21-24; Cohn Dep., RE 114, PageID#3136:5-15).

Sgt. Snyder was 41 years old, 5'10" and 215 pounds. (Snyder Dep., RE 107, PageID#2080:16-25, 2081:16-19). Officer Ort was in his twenties, 5'9", and 175 pounds. (Ort Dep., RE 113, PageID#2976:11-14, 2977:7-9). Officer Zink was in his mid-thirties, 6'2", 260 pounds, and played linebacker in college. (Zink Dep., RE 115, PageID#3220:14-15, 3316:16-21). Mr. Guglielmo was 57 years old, 5'10", and weighed only 155 pounds. (Ex. A, Booking Slip, GB000693). By any measure, Mr. Guglielmo was outmatched.

Defendant Sears stood just outside the door along with correction officers David Cohn and Kyle Chmiel. (Cohn Dep., RE 114, PageID#3136:5-15; Sears Dep., RE 109, PageID#2563:4-9; Chmiel Dep., RE 116, PageID#3415:21-22). In total, there were six officers at Mr. Guglielmo's cell.

Sgt. Snyder entered Mr. Guglielmo's cell at 11:35 p.m. (Video, MCJ 04_CAM 11, RE 119, 11:35:00). For the next 90 seconds, Sgt. Snyder can be seen in-profile standing still and speaking towards the area where Mr. Guglielmo was sitting. (Video, MCJ 04_CAM 11, RE 119, 11:35:00-11:36:30; Sears Dep., RE 109, PageID#2563:6-22). During those 90 seconds, Sgt. Snyder testified that Mr. Guglielmo told Sgt. Snyder he had PTSD, asked to go to the V.A., and asked about getting his medications. (Snyder Dep., RE 107, PageID#2127:3-12). Sgt. Snyder did not offer to contact medical or get help for Mr. Guglielmo. (Snyder Dep., RE 107,

[5] Exhibit 42 (Cell Photo) shows the interior of the cell as seen from the cell door. That view does not include the bench Mr. Guglielmo sat on to the right of the door, which was out of view of the cameras, but is shown in Exhibit 43 (Cell Bench Photo). The best drawn diagram of the cell is Cohn's cell drawing (Ex. 13).

PageID#2130:4-2131:11). Sgt. Snyder admits he didn't solve Mr. Guglielmo's problem, instead he "explained the process to him and, basically, told him make the best of it." (*Id.*). "[T]here was nothing I could do for him." (Snyder Dep., RE 107, PageID#2169:5-16).

Then Sgt. Snyder provoked Mr. Guglielmo.

Officer Zink testified that "I don't recall if [Snyder] said, you know, you are a faggot or if he said the – I know the word faggot was used" and "it was shortly after that [Guglielmo's] demeanor changed." (Zink Dep., RE 115, PageID#3298:12-3299:4). Deputy Sears, standing just outside the cell, "heard Mr. Guglielmo state I'm not a faggot" and "that's when [Guglielmo] stood up and then started yelling at [Snyder]." (Sears Dep., RE 109, PageID#2580:11-25). Soon after the incident was over, Deputy Sears told Sgt. Banks "that Snyder called the guy a faggot. And the guy said, I ain't no faggot, and maybe mentions something about being in the Army or something. And then Snyder called him a faggot again. And the guy stood up because he was mad that Snyder called him a faggot again." (Banks II Dep., RE 60-1, PageID#587:17-25). Defendants' use of force expert, Jeff Eiser, testified that a reasonable person could infer from this testimony that Sgt. Snyder called Mr. Guglielmo a faggot.[6] (Eiser Dep., RE 127, PageID#4252-4253, 94:17-97:1).

After Mr. Guglielmo stood up, Sgt. Snyder stepped forward and pushed Mr. Guglielmo in his chest back down onto the bench, into the corner of the cell. (Sears Dep., RE 109, PageID#2536:11-25, 2540:13-2541:5; Zink Dep., RE 115, PageID#3305:4-17; Snyder Dep., RE

[6] Snyder admits he used the word faggot but claims it was used in a friendly manner. (Snyder Dep., RE 107, PageID#2165:20-2166:24). Defendants' use of force expert, Jeff Eiser, testified that as a correctional supervisor he wouldn't want his staff using the word faggot regardless of the context. (Eiser Dep., RE 127, PageID#4274, 184:1-19). He agreed it is a provocative term, "especially in jails." (*Id*. at PageID#4275, 186:10-13). Gay slurs "are thrown out at inmates all of the time and staff is not allowed to do that, obviously, but we also try to tell the inmates it's not appropriate. You're going to piss somebody off." (*Id*. at PageID#4275, 186:14-187:2).

107, PageID#2184:2-5; Ex. 43, Photo of Bench in Cell).[7] After being called a faggot and pushed backwards, Mr. Guglielmo was cornered and seated in Sgt. Snyder's shadow. Mr. Guglielmo grasped Sgt. Snyder's left forearm. (Ort Dep., RE 113, PageID#3028:20-3029:3; Zink Dep., RE 115, PageID#3305:18-3306:18).[8] Mr. Guglielmo did not punch, kick, smack, elbow, bite, spit, or verbally threaten Sgt. Snyder, he only grasped Sgt. Snyder's left forearm, likely trying to protect himself.[9] (Snyder Dep., RE 107, PageID#2170:9-2171:21). Sgt. Snyder's response was brutal.

For four or five seconds, Sgt. Snyder ordered Mr. Guglielmo to let go. (Sears Dep., RE 109, PageID#2539:7-17, 2555:5-7). Sgt. Snyder then began striking Mr. Guglielmo. He admits he struck Mr. Guglielmo in the right side of his head, punched Mr. Guglielmo in the gut,[10] and then struck him in the left side of his head. (Snyder Dep., RE 107, PageID#2137:7-2145:13). After those three blows, Mr. Guglielmo completely let go of Sgt. Snyder after holding his forearm for less than ten seconds, but Sgt. Snyder wasn't finished. (Snyder Dep., RE 107, PageID#2145:5-6; Sears Dep., RE 109, PageID#2555:8-11). Sgt. Snyder admits he punched Mr. Guglielmo one more time in the left side of his head when Mr. Guglielmo was not touching him. (Snyder Dep., RE 107, PageID#2145:20-23). What Sgt. Snyder will not admit is that after Mr. Guglielmo let go of him, Sgt. Snyder continued using force on Mr. Guglielmo for forty-four seconds.[11] In total, the use of force lasted roughly forty-nine seconds.[12]

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[7] Sgt. Snyder can be seen on the surveillance footage stepping towards Mr. Guglielmo at 11:36:31 p.m. (Video, MCJ 04_CAM 11, RE 119).

[8] Ort testified Guglielmo grasped Snyder's left forearm; Zink testified Guglielmo grasped one of Snyder's wrists; while Snyder claims both of his forearms were grasped. (Snyder Dep., RE 107, PageID#2171:25-2172:14). The most favorable account to the Plaintiff is that Guglielmo only grasped Snyder's left forearm – this is also the most logical because Mr. Guglielmo's injuries were centered on the left side of his head, meaning Snyder was pounding him with his right fist, elbow, and/or forearm, all of which were free from Guglielmo's grasp.

[9] It is reasonable to infer that grasping Sgt. Snyder's forearm was a defensive maneuver, especially considering that Snyder admitted that having his forearm grasped made it more difficult to strike Mr. Guglielmo. (Snyder Dep., RE 107, PageID#2171:25-2172:14).

[10] Officer Ort does not remember Mr. Guglielmo getting punched in the abdomen. (Ex. 25, Ort Interview Transcript, 8:25-9:4).

[11] This timeline integrates Sears' testimony with the video footage: (1) Sears enters the cell when Guglielmo grabs Snyder at 11:36:39 (Sears Dep., RE 109, PageID#2564:4-12); (2) Sgt. Snyder issues commands for four or five

Throughout those forty-nine seconds, Mr. Guglielmo was seated on the bench in the corner of the cell. (Sears Dep., RE 109, PageID#2542:14-24; Ex. 3, Sears Cell Drawing; Ex. 13, Cohn Cell Drawing). Throughout those forty-nine seconds, Officers Zink, Ort, and Sears stood in the cell and just watched. They did not try to stop Sgt. Snyder. (Ort Dep., RE 113, PageID#3008:4-7, 3032:7-11; Zink Dep., RE 115, PageID#3315:20-3316:7; Sears Dep., RE 109, PageID#2554:3-17). Nor did they intervene to help Sgt. Snyder. (Ort Dep., RE 113, PageID#3034:18-3035:1; Zink Dep., RE 115, PageID#3315:20-3316:7; Sears Dep., RE 109, PageID#2551:21-23). They all testified that throughout the use of force they never felt Sgt. Snyder was at risk of harm. (Sears Dep., RE 109, PageID#2552:12-25, 2618:13-17; Zink Dep., RE 115, PageID#3291:13-3292:2; Ort Dep., RE 113, PageID#3034:18-3035:1). Consider Deputy Sears' testimony:

> Q. … Did you try to assist Snyder at any point?
> A. No.
> Q. Why not?
> A. I didn't feel like there was a threat that I needed to get involved in.
> Q. Tell me more about that.
> A. One, I had already had contact with [Guglielmo], so, like I said, I wasn't intimidated by him or threatened by anything that – that he was going to do towards me. Second off, I figured Snyder could handle himself if something did happen in there.
> Q. Okay.
> A. There was no need for me to cause use of force on top of Snyder's.
> Q. Okay. But your -- in your training if there's an officer that's at risk of harm, you are trained to intervene and help that officer, right?
> A. If there is harm going towards that officer, yes.
> Q. So this wasn't a case where you felt there was --
> A. No.
> Q. -- harm coming to Snyder?
> A. No.
> Q. He wasn't at risk of harm?

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seconds and then begins using force at 11:36:44 (Sears Dep., RE 109, PageID#2540:2-10); (2) Guglielmo lets go of Sgt. Snyder's forearms within 10 seconds, by 11:36:49, (Sears Dep., RE 109, PageID#2555:8-11); and (3) the use of force is over when Snyder steps away from Guglielmo at 11:37:33. (Video, MCJ_04 CAM 11, RE 119; Sears Dep., RE 109, PageID#2564:17-24, 2544:23-2545:6).

[12] Defendants' use of force expert Jeff Eiser reviewed the video at his deposition and testified that according to Deputy Sears' testimony the jury could consider that the use of force lasted approximately 50 seconds. (Eiser Dep., RE 127, PageID#4257, 115:3-21, #4258, 119:11-120:12).

A. Myself, no, I didn't feel like he was in threat of harm.

(Sears Dep., RE 109, PageID#2551:21-2552:25).

Q. And in this case you did not feel a need to intervene and protect Snyder, right?
A. I didn't feel Snyder was being attacked.

(Sears Dep., RE 109, PageID#2618:13-17).

Officers Cohn and Chmiel stood outside the cell door and listened to the beating unfold. (Cohn Dep., RE 114, PageID#3136:5-3137:1). Cohn was never concerned for Sgt. Snyder's safety, and he testified that "I stood out there and – I mean, if I saw other officers go towards, I would have gone towards, but no one did. You know, no one did anything, so I waited." (Cohn Dep., RE 114, PageID#3145:12-25; 3143:12-20).

No one moved because Sgt. Snyder was the aggressor. Sgt. Snyder told Sgt. Banks and Sgt. Feehan the night of the use of force that he "shoved Guglielmo back and that he had hit his head on the wall and then he got on top of Guglielmo and struck him." (Banks I Dep., RE 48-1, PageID#:339:16-25). Dep. Sears also told Sgt. Banks that "Snyder shoved him back, and that's when he hit his head and he got on top of him." (*Id*. at PageID#343:9-344:6).

The extent of Mr. Guglielmo's injuries show that the beating was much more severe than the four blows described by Sgt. Snyder. Dr. Paul Gabriel, chairman of the emergency department at the busiest level I trauma center in Ohio, testified as follows:

> The deposition by Mr. Snyder and the other corrections officers note four blows, one to the abdomen and one to the right side of the face, which was not the injured side, and two blows to the left side of the face and head that he stated were -- occurred within seconds, maybe ten seconds. Could that have caused the degree of injury with massive acute bleeding on the brain, mass effect, severe neurologic deficit, massive facial fractures? No, that's not possible.
>
> And, again, we got to understand how much damage there was. This is damage that you see when somebody face plants at 90 miles an hour. This is damage that you see getting repeatedly struck by a baseball bat, not once, multiple, multiple times. This is the degree that you see when -- I see the construction workers fall out of the third floor windows onto their face. This is massive. This is not subtle. This is a guy who almost

> died because of a massive acute bleed on his brain. So, no, could two blows do this? I don't see any way under the realm in heaven that could occur.

(Gabriel Dep., RE 128, PageID#4354-4355, 168:12-169:15, #4347, 137:22-138:1, #4331, 76:19-20, #4330, 71:24-72:15).

After Sgt. Snyder ceased his use of force, Mr. Guglielmo was in tears, bleeding from his nose, and his face was swelling. (Snyder Dep., RE 107, PageID#2180:13-24; Sears Dep., RE 109, PageID#2543:10-18). Sgt. Snyder said nothing to him; he just turned and walked out of the cell. (Snyder Dep., RE 107, PageID#2147:3-12).

Sgt. Snyder did not radio for medical when he left the cell. (Mills Dep., RE 118, PageID#3623:21-23). He did nothing until he bumped into Nurse Greg Mills on the platform and asked Mills to fetch an ice pack. (*Id*. at PageID#3623:10-20). Sgt. Snyder did not tell Nurse Mills that he had struck Mr. Guglielmo in the head or that there had been a use of force. (*Id*. at, PageID#3624:20-8). Nurse Mills fetched an ice pack, intending to just hand it to Sgt. Snyder, but then he decided to give it directly to Mr. Guglielmo. (*Id*. at PageID#3624:6-19). Nurse Mills did not arrive at the transport staging cell until 15 minutes after the use of force. (Video, MCJ_04 CAM 11, RE 119, 23:53:20). Nurse Mills attended to Mr. Guglielmo just outside the cell door and decided he should be moved to another cell where corrections officers could keep a closer watch on him. (*Id*.; Mills Dep., RE 118, PageID#3587:8-18). At 11:57 p.m., approximately 20 minutes after the use of force, Mr. Guglielmo was led away from his cell. (Video, MCJ_04 CAM 11, RE 119, 23:57:33). He could barely walk, collapsing at one point, needing the physical support of corrections officers. (Video, MCJ 04_CAM 12, RE 119, 23:57:43; Eiser Dep., RE 127, PageID#4271-4272, 171:18-174:13). Soon to be paralyzed, those were the last steps of his life.

At 12:18 p.m., Officer Zachary Zink checked on Mr. Guglielmo who was lying on the floor of his new cell unresponsive. (Zink Dep., RE 115, PageID#3343:1-3344:5; Ex. 5, Incident Report, GB32). A squad was called. Mr. Guglielmo was then transported to the hospital. (Zink Dep., RE 115, PageID#3345:2-8).

Upon arrival at the hospital, Mr. Guglielmo received an emergency craniotomy. (Waldman Report, RE 129-1, PageID#4484). Four holes were drilled into Mr. Guglielmo's skull, the holes were connected, and his skull was peeled back to expose a large pool of blood trapped between his brain and skull wall. The blood was suctioned out, but Mr. Guglielmo remained comatose. (*Id.*; Ex. 76, Brain Surgery Operative Notes, GB000157). Approximately a week later, surgeons opened up the left side of Mr. Guglielmo's face to repair his broken facial bones. They drilled 24 screws into his skull, attaching five titanium plates. (Waldman Report, RE 129-1, PageID#4484; Ex. 77, Facial Reconstruction Operative Notes, GB000154). The orbital floor of his eye was fractured so severely it could not be surgically repaired. (*Id.*; Waldman Report, RE 129-1, PageID#4498-4499).

Mr. Guglielmo remained comatose in the hospital for three weeks. (Waldman Report, RE 129-1, PageID#4484). He was transferred to an intermediate care facility where he slowly regained consciousness and functional capacity. (*Id.*) Even after physical and occupational therapy, Mr. Guglielmo is left with "a right facial droop, a dense left hemiplegia (paralysis on the left side of his body), an inability to ambulate, memory and concentration difficulties, and significant personality changes that according to family include being depressed, anxious and not in as good control of his temper and behavior as he had been prior to the beating at the jail." (*Id.*). Mr. Guglielmo also suffers from Post Traumatic Amnesia and does not remember anything from when he was booked into the jail until he woke up in the intermediate care

facility. (*Id*. at PageID#4486; Guglielmo Dep., RE 103, PageID#1746:25-1747:17). "Here I am in a wheelchair," he testified, "in a diaper, and I don't have any idea how I got here." (*Id*. at PageID#1758:8-10).

Mr. Guglielmo, now sixty, currently lives in a Florida nursing home, but he wants to live with his mom and sister, "Because I love my family. I just need to – I just need them around." (Guglielmo Dep., RE 103, PageID#1724:2-7, 1760:4-10). Dr. Patricia Brock, a certified lifecare planner, determined that Mr. Guglielmo's ongoing medical needs are so serious that it will cost $5,286,858 for him to move out of the nursing home and live out the rest of his natural life near the people he loves. (Ex. B, Brock Report, p. 8).

Montgomery County is as responsible for Mr. Guglielmo's injuries as Sgt. Snyder. The County has a pattern and practice of permitting the use of excessive force in the jail, particularly by Sgt. Snyder. Sgt. Snyder only worked in the jail for one and a half years, during which he used force 31 times. (Snyder Dep., RE 107, PageID#2067:14-23; Ex. Berg A, Berg Report, p. 30). Michael Berg, a corrections expert who has reviewed thousands of uses of force over the course of his career, determined 29 of Sgt. Snyder's uses of force involved excessive force. (*Id*. at p. 30). In four specific incidents, Sgt. Snyder went to an inmate's cell because the inmate was banging on his/her cell door. (Ex. 48, UoF Incident Report – Hammad 11.13.13; Ex. 49, UoF Incident Report – Hammad 2.11.14; Ex. 50, UoF Incident Report – Rowe 3.5.14; Ex. 51 UoF Incident Report – McIntosh 11.15.13; Ex. Berg A, Berg Report, p. 30). He ordered them to stop. In each of those four incidents the inmate obeyed and stopped. (*Id*.). Nonetheless he entered their cells and assaulted them when they posed minimal (if any) risk of harm to him or anyone else. (*Id*.). These incidents show Sgt. Snyder routinely used force on inmates simply because they were banging on their cell doors. All of Sgt. Snyder's uses of force were reported to the

Chief Deputy, the Jail Division Commander, and the Training Center, and they were approved as within policy. (*Id.*; Snyder Dep., RE 107, PageID#:2256:24-2257:21; Ex. 70, Guglielmo UoF Report). Michael Berg further reviewed the uses of force by all the Defendants in the case dating back to 2012. He found that of their 120 uses of force, 71 involved excessive force, or 59.1%. (Ex. Berg A, Berg Report, p. 30). Sheriff Plummer testified that in his 10 years as Sheriff only one officer has been disciplined for using excessive force. (Plummer Dep., RE 74, PageID#1311-1312, 85:24-87:11)

The investigation of this incident was meaningless. For example, Detective Cavender, who did the investigation of this incident, testified that he did not interview Zachary Zink, who was in the cell at the time the use of force happened. (Cavender Dep., RE 70, PageID#834, 60:8-24). Zachary Zink, however, testified someone called him on the phone and spoke with him, but there is no record of that conversation. (*Id.*; Zink Dep., RE 115, PageID#3350:2-3352:19). Mr. Guglielmo was not interviewed, and neither were Sgt. Banks or Whalen. (*See generally* Ex. 41, Internal Investigation Report). Investigators set out to confirm Snyder's story and consequently never uncovered that he threated to beat Mr. Guglielmo's ass at roll call or that he called Mr. Guglielmo a faggot. (*Id.*). Simply put, the investigation was a "farce." (Banks II Dep., RE 60-1, PageID#594:10-13).

Montgomery County's pattern and practice of using excessive force in the jail is well-known and yet the County and Sheriff have done nothing about it. The County has paid out nearly one million tax-payer dollars to settle recent lawsuits alleging excessive force.[13] Six months after this lawsuit was filed, the County Commissioners requested that the United States Department of Justice investigate how force is being used within the jail. (Ex. 81, DoJ Letter).

[13] Stewart & Sweigart, County spending on jail lawsuits tops $1M, available at: https://www.mydaytondailynews.com/news/crime--law/county-spending-jail-lawsuits-tops/orKtqgEYGaqdU0xpeoHKBM/ (last accessed June 28, 2018).

The request fell on deaf ears, so instead of a DOJ investigation, the Commission set up a "Justice Advisory Committee" to provide oversight of the jail. (Plummer Dep., RE 74, PageID#1333, 172:1-173:14). However, Sheriff Plummer "was instrumental in picking who was members of the committee." (*Id.*). And when asked what authority the committee has, Plummer testified, "Really none." (*Id.*). Instead of addressing the systemic problems in his jail, Sheriff Plummer covers up evidence of wrongdoing[14] and retaliates against employees who have the courage to alert the public to those problems.[15] Montgomery County could have prevented this use of force, or, afterwards, tried to prevent it from ever happening again; but the County has done nothing.

II. PARTIES

As a preliminary matter, Plaintiff concedes that Bradley Cooper should be dropped from the lawsuit pursuant to Fed. R. Civ. P. 21.[16] Plaintiff further concedes that David Cohn should be dropped as a defendant because he stood outside the cell at the time of the use of force, did not see the use of force, and did not see Mr. Guglielmo's condition after the use of force. (Cohn Dep., RE 114, PageID#3140:7-3141:17, 3159:23-3160:2).[17] The remaining Defendants should be Sergeant Matthew Snyder, Deputy Matthew Sears, Officer Zachary Zink, Officer Brandon Ort, Sheriff Phil Plummer, and Montgomery County.

III. ARGUMENT

A) Standard for Determining Motion for Summary Judgment on Qualified Immunity

Summary judgment may be granted only "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed.

[14] Before Montgomery County settled with Amber Swink, her claim against Sheriff Phil Plummer for spoliation of evidence survived his *Iqbal* challenge. *Swink v. Montgomery Cty. Bd. of Commissioners*, No. 3:16-CV-392, 2017 WL 3600433, at *6 (S.D. Ohio Aug. 18, 2017).
[15] Including using this litigation to attack Eric Banks and Ransley Creech.
[16] Plaintiff sent the Defendants a draft joint motion to drop Officer Cooper as a defendant in April 2018 but received no response.
[17] Officer Cohn's testimony is not contradicted by the video of the outside of the cell. (Video, MCJ 04_CAM 11, RE 119, 23:34:45-23:38:00).

R. Civ. P. 56(a). The evidence presented is construed in the light most favorable to the non-moving party, which is given the benefit of all favorable inferences that can be drawn from them. *U.S. v. Diebold, Inc.*, 369 U.S. 654, 655 (1962); *Cox v. Kentucky Dept. of Transp.*, 53 F.3d 146, 150 (6th Cir. 1995). "The central issue is 'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" *Spadafore v. Gardner*, 330 F.3d 849, 852 (6th Cir. 2003) (*quoting Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 251-252 (1986)).

To establish a claim under 42 U.S.C. § 1983 a plaintiff must show: (1) that he was deprived of a right secured by the Constitution or federal law; and (2) that the Defendants, acting under the color of state law, caused the deprivation. *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 155-157 (1978).

Officers are entitled to assert the defense of qualified immunity if the right they have violated was not clearly established and not something a reasonable officer would have known at the time of the violation. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Once the defense of qualified immunity has been asserted, courts generally engage in a two-step analysis to determine if the defendant is entitled to the defense. *Saucier v. Katz*, 533 U.S. 194, 200-201 (2001), *overruled in part by Pearson v. Callahan*, 555 U.S. 223 (2009). The first question to ask is, "[t]aken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" *Id.* at 201. Once the court establishes that the officer's conduct violated some federally protected right, it may proceed to ask, "whether the right was clearly established." *Id.* Although this sequential analysis is not mandatory, it remains beneficial because "it often may be difficult to decide whether a right is clearly established without deciding precisely what the existing constitutional right happens to be." *Pearson*, 555

U.S. at 236 (*citing Lyons v. City of Xenia*, 417 F.3d 565, 581 (6th Cir. 2005) (Sutton, J., concurring)).

B) Material Facts Are in Dispute Making Summary Judgment Inappropriate

The Court can rule on this motion by reading nothing more than the parties' respective recitation of the facts. The material factual disputes are voluminous. And Defendants' failure to seek summary judgment based on the facts most favorable to the Plaintiff is fatal to their motion, which takes 34 pages to describe disputed facts. The Supreme Court's "qualified-immunity cases illustrate the importance of drawing inferences in favor of the nonmovant." *Tolan v. Cotton*, 134 S. Ct. 1861, 1866 (2014) (reversing Fifth Circuit for failure to view facts of police shooting in light most favorable to plaintiff).

Plaintiff presented 24 of the material facts outlined above to Defendants' use of force expert, Jeff Eiser, at his deposition, most with citations to the record. Defendants' expert agreed that those facts were part of the facts and circumstances that should be considered to determine whether the force used by Sgt. Snyder was reasonable.

Despite being alerted to these facts, Defendants' Motion disputes three of those facts, omits four disputed facts, recognizes five undisputed facts, and does not mention twelve of those facts, thus conceding those twelve facts should be considered undisputed for summary judgment purposes.

Disputed Facts in the Defendants' Motion

1. Mr. Guglielmo's banging was typical behavior. (Eiser Dep., RE 127, PageID#4242-4243, 54:14-58:20; Def. Mot. S. Judg., RE 123, PageID#3954-3957).

2. At roll call, Sgt. Snyder said he was going to "beat that crazy fucker's ass." (Eiser Dep., RE 127, PageID#4243-4244, 60:20-62:24; Def. Mot. S. Judg., RE 123, PageID#5958-3959).

3. Mr. Guglielmo said, "I'm not a faggot" just prior to use of force, making it reasonable to conclude Snyder called him a faggot. (Eiser Dep., RE 127, PageID#4252, 95:3-96:13; Def. Mot. S. Judg., RE 123, PageID#3963-3964).

Disputed Facts not in the Defendants' Motion

1. Snyder pushed Mr. Guglielmo down onto the bench before Mr. Guglielmo grasped Sgt. Snyder's forearm. (Eiser Dep., RE 127, PageID#4253, 98:24-99:24).

2. Mr. Guglielmo was seated throughout the use of force. (*Id*. at PageID#4254, 101:4-102:15).

3. Sgt. Snyder's use of force lasted approximately 50 seconds. (*Id*. at PageID#4257, 115:3-21, #4258, 119:11-120:12).

4. Mr. Guglielmo did not try to attack Sgt. Snyder. (*Id*. at PageID#4261, 129:4-19).

Undisputed Facts in Defendants' Motion

1. Mr. Guglielmo complied with Sgt. Snyder's commands to stop banging and back away from the door. (*Id*. at PageID#4246, 69:18-71:7; Def. Mot. S. Judg., RE 123, PageID#3987).

2. Before entering the cell, Sgt. Snyder knew he was not going to fix Mr. Guglielmo's medication issue. (Eiser Dep., RE 127, PageID#4249, 82:15-84:1; *partially at* Def. Mot. S. Judg., RE 123, PageID#3962).

3. Mr. Guglielmo released his grasp on Sgt. Snyder before the last punch Sgt. Snyder admits he used. (Eiser Dep., RE 127, PageID#4254, 103:7-104:7; Def. Mot. S. Judg., RE 123, PageID#3986).

4. Mr. Guglielmo was only holding onto to Sgt. Snyder's forearm for 10 seconds. (Eiser Dep., RE 127, PageID#4258-4259, 120:18-121:21; *partially at* Def. Mot. S. Judg., RE 123, PageID#3969-3970).

5. Mr. Guglielmo suffered severe injuries. (Eiser Dep., RE 127, PageID#4266, 149:6-151:5; Def. Mot. S. Judg., RE 123, PageID#3984).

Undisputed Facts by Virtue of Omission from Defendants' Motion

1. Sgt. Snyder asked for a handheld camera to be brought to the cell because he thought force might be used. (Eiser Dep., RE 127, PageID#4245, 65:13-67:12).

2. Sgt. Snyder brought a can of OC spray to the cell because he thought force might be used. (*Id*.).

3. Sgt. Snyder gathered five other officers because he thought force might be used. (*Id*.).

4. Sgt. Whalen told Sgt. Snyder to leave Mr. Guglielmo alone. (*Id*. at PageID#4238, 37:20-38:2, #4246, 69:1-20).

5. Mr. Guglielmo told Sgt. Snyder before the cell door was opened that what he wanted was medication. (*Id*. at PageID#4248, 79:1-21).

6. At the cell door, Dep. Sears told Sgt. Snyder not to enter the cell. (*Id*. at PageID#4238, 39:3-8, #4251, 92:5-22).

7. None of the officers at the cell door saw any reason to enter the cell. (*Id*. at PageID#4238, 37:13-19, #4251, 90:21-92:4).

8. Zink, Ort, and Sears did not try to assist Sgt. Snyder during the use of force. (*Id*. at PageID#4260-4264, 127:25-144:19).

9. Zink, Ort, and Sears did not react because they felt Sgt. Snyder was not at risk of harm. (*Id*.).

10. Mr. Guglielmo had trouble walking when he left the transport staging cell. (*Id*. at PageID#4271-4272, 171:9-174:13).

11. The 120 prior uses of force by the Defendants support Plaintiff's *Monell* claim for custom, pattern and practice. (*Id*. at PageID#4236, 30:8-25).

12. The four specific use of force incidents involving Sgt. Snyder using force on inmates banging on cell doors support Plaintiff's *Monell* claim for custom, pattern and practice. (*Id*. at PageID#4236, 31:16-32:24).

Defendants' failure to argue the material facts that apply at summary judgment is inexcusable and dispositive of their motion.

Montgomery County knows they must argue the facts in the light most favorable to the Plaintiff, yet they chose not to. The Sixth Circuit recently refused to consider part of an appeal by Montgomery County because of their failure to accept the facts as presented by the Plaintiff and adopted by the district court. *Hopper v. Phil Plummer*, 887 F.3d 744, 758 (6th Cir. 2018) ("Defendants also maintain that they did not disregard any substantial risk to Richardson because they were 'working alongside' medical personnel. Because this argument is premised on factual

disputes, we lack jurisdiction to consider it on interlocutory appeal."). At oral argument in that case, the Sixth Circuit panel specifically reminded Defense counsel to accept the Plaintiff's version of the facts. *David M. Hopper v. Montgomery County Sheriff et. al*, Dec. 5, 2017, Case No. 17-3175, available at http://www.opn.ca6.uscourts.gov/internet/court_audio/aud1.php, at 3:12 ("We don't resolve disputes in fact on interlocutory appeal on governmental immunity… and we actually … accept the plaintiff's version. That is the only way we can – we can have a governmental immunity appeal.").

Rather than accept the facts in the light most favorable to the Plaintiff, Defendants solely rely on Sgt. Snyder's testimony and argue that he is the only reliable reporter because Mr. Guglielmo has post-traumatic amnesia[18] and the other officers supposedly had an obstructed view. Never mind that all three officers in the cell gave a detailed account of what happened, with Sears even acting it out, and none testified that their view was obstructed.[19] More importantly, Sgt. Snyder undermined his own account. When asked to recount the events to the "best of [his] recollection," he was able to give detailed blow-by-blow testimony. (Snyder Dep., RE 107, PageID#2138:1-4, 2136:2-2147:2). Five pages of that testimony is cited verbatim in Defendants' brief. (Def. Mot. S. Judg., RE 123, PageID#3964-3968). However, later in his deposition, when asked about other incidents when he punched inmates in the head, he volunteered the following:

> Q. So you have no specific recollections --
> A. No.
> Q. -- of any incidents other than this one?
> A. I don't even have specific recollection of this one right now.
> Q. What do you mean by that?

[18] Plaintiffs do not rely on Mr. Guglielmo's testimony regarding what happened in the cell.
[19] Officer Ort also testified, "Q. Are you saying that you couldn't see? A. No…" (Ort Dep., RE 113, PageID#3037:6-8).

> A. Just what I said. Unless – other than reading all of these reports and stuff, I don't remember specifics of strikes to the head. If it wasn't documented, I don't remember it. Does that make sense? It's three years ago.
> …
> Q. Well, what -- I want to back up one second. So when you were talking about those four strikes that were in this case, that was based on what you wrote in your report, right?
> A. Yes.
> Q. But now you don't actually remember the blow by blow of the incident, right?
> A. I do not remember the blow by blow.
>
> (Snyder Dep., RE 107, PageID#2254:8-21, 2255:16-2256:1).

At his deposition, Sgt. Snyder admitted he did not remember what happened in the cell. His deposition was merely a performance of the script he wrote after driving to the hospital to confirm that Mr. Guglielmo was going to require surgery for a hematoma, and then watching the video of the incident. (Snyder Dep., RE 107, PageID#2199:22-2200:10, 2205-2211; Ex. 5 Incident Report, GB000030).[20] [21] Sgt. Snyder was the only officer who wrote a detailed contemporaneous narrative of what happened in the cell. Three witnesses of the use of force (Deputy Sears, Officer Zink, and Officer Cohn) omitted detailed reports of what they witnessed, and two witnesses (Officer Ort and Officer Chmiel), wrote no report at all. (Ex. 5, Incident Report; Ort Dep., RE 113, PageID#2988:15-23; Chmiel Dep., RE 116, PageID#3433:8-13). Yet the witnesses were all still able to testify to their memory of the events.

The lack of contemporaneous witness reports was not a fluke. In the Montgomery County Jail, when a use of force happens, it is the practice that only officers who are "directly involved" meaning they used force or issued some sort of command during the incident need to write a report. (Ort Dep., RE 113, PageID#2989:5-2990:21; Chmiel Dep., RE 116, PageID#3433:8-3437:15). But if an officer just stands there and does nothing and says nothing,

[20] Snyder wrote his incident report at 3:07 a.m., this was after he visited the hospital and spoke with Sears, because Sears left the hospital at 1:55 a.m.
[21] Oddly, Snyder testified in detail about a trivial incident one week prior to his use of force on Mr. Guglielmo where he got disciplined for making a joke about someone taking a picture of their balls in a crockpot. (Snyder Dep., RE 107, PageID#2265:17-2268:18).

acting only as a witness to another officer's use of force, they are not required to write an incident report. (*Id*.). And even when multiple officers write incidents reports, they write about only their part in the incident. (Cohn Dep., RE 114, PageID#3164:5-3165:23; Sears Dep., RE 109, PageID#2570:10-2572:20). "It's just the jail practice" that if only one officer uses force and others witness it, there will only be one account documented of what happened. (*Id*.). In this incident, according to the practice of the Montgomery County Sheriff, only Sgt. Snyder would have written about the force he used. (Cohn Dep., RE 114, PageID#3165:4-9). As Deputy Sears testified, "I write what I did. Snyder writes what he did." (Sears Dep., RE 109, PageID#2572:14-20; Cohn Dep., RE 114, PageID#3165:4-9).

The odious purpose of this practice is demonstrated by this case. Both Ort and Sears read Sgt. Snyder's statement before they were interviewed during the use of force investigation. (Sears Dep., RE 109, PageID#2573:22-2574:9; Ex. 25, Ort Interview Transcript, 4:14-25). Sears agreed Sgt. Snyder's report was "the only report [he] had to review that recited the facts of the use of force." (Sears Dep., RE 109, PageID#2573:22-2574:9). Detective Cavender, the investigator, even said to Ort at his interview, "Prior to this interview, I provided you with a report to look over; is that correct?" (Ex. 25, Ort Interview Transcript, 4:14-25). And the third eyewitness, Officer Zink, who was not interviewed, read Sgt. Snyder's incident report before his deposition. (Zink Dep., RE 115, PageID#3243:1-13; Ex. 5 Incident Report). This practice of using one narrative by the user of force highlights the factual disputes. It does not, as Defendants argue entitle them to summary judgment because there is only one detailed narrative of the blow by blow – Sgt. Snyder's.[22] This strategy fails because Sgt. Snyder admitted he was

[22] Defendants go so far as saying "all inferences about what happened in the cell in contravention to Sgt. Snyder's recitation can be nothing more than speculation." (Def. Mot. S. Judg., RE 123, PageID#3979). Again, all reasonable inferences about what happened in the cell in contravention to Sgt. Snyder's recitation that are based on admissible evidence must be drawn in Plaintiff's favor, not dismissed as speculation.

not testifying from memory but was repeating the script he carefully crafted. Montgomery County's practice of not gathering potentially contradicting narratives from the eyewitnesses of a brutal use of force, does not mean facts are not disputed.

Of course, there is one witness who is out of their control, but Defendants are quick to note, "At the outset, it is essential to note that Mr. Guglielmo has no independent recollection whatsoever of any of the events at the Montgomery County Jail." (Def. Mot. S. Judg., RE 123, PageID#3943). In light of Montgomery County's use of force reporting practices, a jury could conclude that Mr. Guglielmo's post-traumatic amnesia is the most authentic and accurate account of what happened in transport staging cell 114 – for he was indisputably beaten into a coma. He could have easily put on a performance of his own, but he told the truth, "I remember being booked in. After that, it's -- forget about it." (Guglielmo Dep., RE 103, PageID#1746:25-1747:3).

Because Defendants' motion ignores Plaintiff's version of the facts, relies on confederated testimony, and includes extraneous facts[23] their summary judgment motion must be denied.

C) Plaintiff Has Submitted Sufficient Facts in the Record for a Jury to Find that the Force Used by Defendant Snyder Was Objectively Unreasonable

In January of 2015, in the Sixth Circuit, the law was clearly established that an "objective reasonableness" standard applies to an inmate's excessive force claims when the force was used prior to the inmate's probable cause hearing. *Aldini v. Johnson*, 609 F.3d 858, 866 (6th Cir. 2010) (Montgomery County corrections officers denied qualified immunity for punching,

[23] Defendants' fact section includes three pages dedicated to the circumstances related to Mr. Guglielmo's arrest, which has no bearing on their motion, but were included only to make Mr. Guglielmo look unsympathetic for allegedly using an offensive racial slur 24-hours before Sgt. Snyder beat him into a coma. Even with those allegations, however, Defendants fail to present Mr. Guglielmo's contradictory testimony. Mr. Guglielmo testified he does not use the word "nigger," and when asked whether he considers the term offensive he said, "Yes, very much so." (Guglielmo Dep., RE 103, PageID#1735:24-1736:3).

kicking, and tasing an inmate because he repeatedly asked to use the phone). Mr. Guglielmo was awaiting his probable cause hearing at the time of the use of force.[24]

In June 2015, the Supreme Court further extended the "objective reasonableness" standard to uses of force on all pretrial detainees. *Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2473 (2015). Under *Aldini*, the Sixth Circuit referenced the *Graham* factors to analyze the objective reasonableness of a corrections officer's use of force. *See Burgess v. Fischer*, 735 F.3d 462, 474 (6th Cir. 2013). This approach was clumsy because the *Graham* factors were designed to analyze the facts and circumstances during an arrest. In *Kingsley*, the Supreme Court clarified that courts should look at additional factors in a corrections environment:

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

135 S. Ct. at 2473.

Kingsley was decided after the use of force on Mr. Guglielmo; but since *Kingsley*, the Sixth Circuit and the Southern District of Ohio have utilized the *Kingsley* factors to analyze use of force cases arising from incidents between 2010 and 2015 which were subject to the reasonableness test under *Aldini*. *See Morabito v. Holmes*, 628 F. App'x 353 (6th Cir. 2015) (*Kingsley* applied to find corrections officers used excessive force on disruptive inmate after provoking him in 2011); *Hopper v. Montgomery Cty. Sheriff*, No. 3:14-CV-158, 2017 WL 495511, at *8 (S.D. Ohio Feb. 6, 2017) aff'd in part, dismissed in part sub nom. *Hopper v. Phil*

[24] Mr. Guglielmo was brought to jail on January 15, 2015, at approximately 3:00 a.m. by Dayton police officers after a warrantless arrest for misdemeanor assault. He spent the day in jail, awaiting his probable cause hearing on January 16, 2015, scheduled for 1:30 p.m. (Dayton Municipal Court Case No. 2015-CRB-233). It is undisputed that the use of force occurred at approximately 11:30 p.m. on January 15, 2015, prior to Mr. Guglielmo's probable cause hearing.

Plummer, 887 F.3d 744 (6th Cir. 2018) (Montgomery County corrections officers denied qualified immunity for restraining inmate on the floor for 22 minutes using compressive force and causing his death through asphyxia in May 2012); *Williams v. Collins*, No. 15-CV-337, 2017 WL 1196114, at *5 (S.D. Ohio Mar. 31, 2017) (relying on *Kingsley* to deny corrections officers qualified immunity for punching inmate in head in 2014). This makes sense, because "objective reasonableness turns on the 'facts and circumstances of each particular case.'" *Kingsley*, 135 S.Ct. at 2473 (*quoting Graham v. Connor*, 490 U.S. 386, 396 (1989)). Since *Aldini*, the Sixth Circuit has looked at the "totality of the circumstances" in corrections cases. *Burgess*, 735 F.3d at 472. *Kingsley* did not change the law of the Sixth Circuit, it extended *Aldini* and enumerated certain factors within the "totality of circumstances" more tailored to the corrections environment than the *Graham* factors. Thus, it is totally appropriate, and advisable, for this court to utilize the *Kingsley* factors to analyze the facts and circumstances of this case. Furthermore, Defendants agree that *Kingsley* is the proper standard. (Def. Mot. S. Judg., RE 123, PageID#3982).

Before conducting a point-by-point *Kingsley* analysis, however, the Court should consider the Sixth Circuit's on-point decision in *Morabito v. Holmes*, 628 F. App'x 353 (6th Cir. 2015) involving a 2011 use of force. In that case, like this one, the defendants "entered [the plaintiff's] cell without a legitimate purpose – they simply were frustrated with [the plaintiff's] outbursts and demands for medical treatment – and stood over him, taunting him." *Id*. at 354. The plaintiff was "not attempting to hurt himself, and posing no threat to anyone else." *Id*. Regardless, the "defendants then knocked [the plaintiff's] head aside, pinned him to the ground, punched him, and then used a Taser against his neck for five seconds." *Id*. The defendants claimed the plaintiff attempted to spit on them, balled his fists, and tried to tackle an officer. *Id*.

at 357-358. The video evidence was unclear, and the court ultimately concluded that provoking an altercation with an inmate out of frustration and then slapping, tasing, and punching the inmate was not an objectively reasonable use of force and the defendants were denied qualified immunity. *Id*. at 358.

Morabito is on all fours with this case. Defendants Snyder, Zink, Ort, and Sears had no legitimate purpose for entering Mr. Guglielmo's cell – they were just frustrated with his banging and yelling for medical attention. In fact, all the Defendants except Sgt. Snyder admitted they saw no reason to go in the cell. (Zink Dep., RE 115, PageID#3293:1-7; Ort Dep., RE 113, PageID#3020:3-8; Sears Dep., RE 109, PageID#2531:18-21; Cohn Dep., RE 114, PageID#3138:20-3139:12). Once inside the cell, Sgt. Snyder provoked Mr. Guglielmo by calling him a faggot. Despite this provocation, Mr. Guglielmo did not respond with violence. He did not spit at anyone, ball up his fists or try to tackle anyone as the plaintiff in *Morabito* allegedly did. Mr. Guglielmo's only response was to stand up and say, "I'm not a faggot." (Banks II Dep., RE 60-1, PageID#587:17-25). Sgt. Snyder then stepped forward and pushed Mr. Guglielmo back onto the bench. At that point, Mr. Guglielmo defensively grasped Sgt. Snyder's forearm. (Ort Dep., RE 113, PageID#3028:20-3029:3; Zink Dep., RE 115, PageID#3305:18-3306:18). Mr. Guglielmo's response to Sgt. Snyder pushing him down was so benign that none of the officers in the cell thought Sgt. Snyder was at any risk of harm and consequently none of them stepped in to assist him. (Sears Dep., RE 109, PageID#2552:12-25, 2618:13-17; Zink Dep., RE 115, PageID#3291:13-3292:2; Ort Dep., RE 113, PageID#3034:18-3035:1). It is undisputed that Sgt. Snyder punched Mr. Guglielmo in the head at least once after Mr. Guglielmo let go. (Snyder Dep., RE 107, PageID#2145:20-23). Further, based on the testimony and video evidence, a jury could conclude that Sgt. Snyder continued to use force for forty-four

seconds while Mr. Guglielmo was seated on the bench not touching Sgt. Snyder in any way. (See supra footnote 10). And Sgt. Snyder's force was so severe Mr. Guglielmo's face was splintered, his brain was severely injured, and he is now paralyzed.

In light of *Morabito*, Defendant Snyder's use of force was objectively unreasonable. This conclusion is further affirmed by a step-by-step analysis of the *Kingsley* factors.

1) There Was No Need for Defendant Snyder to Use Any Force and Yet He Used Deadly Force

To determine whether a use of force was objectively reasonable, a court should consider "the relationship between the need for the use of force and the amount of force used." *Kingsley*, 135 S. Ct. at 2473. "In other words, we ask whether [the officer] had a reasonable basis for using the amount of force that he did." *Cordell v. McKinney*, 759 F.3d 573, 582 (6th Cir. 2014). Because "the amount of force that was used must be roughly proportionate to the need for the application of force." *Kulpa for Estate of Kulpa v. Cantea*, 708 F. App'x 846, 853 (6th Cir. 2017) (*citing Cordell*, 759 F.3d at 581). In this case, Defendant Snyder used head strikes, which constitute deadly force. (Zink Dep., RE 115, PageID#3319:9-23; Sears Dep., RE 109, PageID#2624:8-12; Ort Dep., RE 113, PageID#2969:2-7). Defendant Snyder had no reasonable basis to use deadly force on Mr. Guglielmo, and the amount of force he used was disproportionate to any need for force.

a. There was no need to enter the cell, let alone use force

Defendants Snyder, Sears, Zink, Ort, and Cohn went to Joseph Guglielmo's cell because Mr. Guglielmo was banging on his cell door. This is nothing unusual in a jail. (Zink Dep., RE 115, PageID#3262:1-6). In fact, it happens all the time. (*Id.*). Over time, corrections officers "learn to kind of buffer out the screaming and banging." (Sears Dep., RE 109, PageID#2519:15-21). And in this case, Mr. Guglielmo's banging was typical. (Zink Dep., RE 115,

PageID#3271:24-3272:24; Sears Dep., RE 109, PageID#2519:22-24; Snyder Dep., RE 107, PageID#2116:23-2117:19). "Most of the time, a person will bang for 10 or 15 minutes. When they realize they are not getting any attention, then they stop." (Banks I Dep., RE 48-1, PageID#319:16-22).

Deputy Sears told Sgt. Snyder that Mr. Guglielmo was in transport staging because he wanted his medications and Sears had already explained to Mr. Guglielmo that medications wouldn't be passed out until the morning. (Sears Dep., RE 109, PageID#2522:3-25). Sears further told Sgt. Snyder that Sgt. Snyder wasn't going to be able to talk to Mr. Guglielmo and "I don't know if you're going to get anything through to him." (Sears Dep., RE 109, PageID#2523:9-15). Nonetheless Sgt. Snyder gathered up the defendants and went to Mr. Guglielmo's cell. (Snyder Dep., RE 107, PageID#2124:23-2125:3; Feehan Dep., RE 117, PageID#3489:22-25, 3491:12-19). When the Defendants arrived at the cell and Sgt. Snyder began talking with Mr. Guglielmo through the cell door, and Mr. Guglielmo "calmed down." (Sears Dep., RE 109, PageID#2529:11-19). At this point, Deputy Sears told Sgt. Snyder there was no need to go in the cell. (Sears Dep., RE 109, PageID#2574:16-2575:7; Ex. 6, Sears Interview Transcript, 8:11-9:15). Before entering the cell, Sgt. Snyder knew Mr. Guglielmo wanted medication and medical attention, but Sgt. Snyder did not contact medical and ask them to help Mr. Guglielmo.[25] He knew the problem, he just chose not to solve it. Instead, he escalated the situation and entered the cell with a show of force and no camera.

[25] Defendants claim that "Mr. Guglielmo requested and received a medical review at approximately 10:44:13 p.m. on January 15, 2015." (Def. Mot. S. Judg., RE 123, PageID# 3954). This is incorrect. When Mr. Guglielmo was transferred to transport staging, he spoke with Tammy Pless, a "crisis therapist," who was "not a medical professional." (Pless Dep., RE 111, PageID#2795:18-2796:25, 2815:24-2816:2). She did not "have anything to do with medication." (*Id*. at 2816:12-2817:4). She did not work for the medical provider in the jail, NaphCare. (*Id*. at 2804:19-2805:10). With Mr. Guglielmo, all she did was assess whether he was suicidal and then she planned to refer him to the doctor. (*Id*. at 2827:6-16, 2831:12-2835:22). She did not provide a medical review and was incapable of helping Mr. Guglielmo with his request for medication.

Zink, Ort, and eventually Sears followed Sgt. Snyder into the cell, but none of them saw any reason for Sgt. Snyder to enter the cell in the first place. (Sears Dep., RE 109, PageID#2531:18-21, 2533:8-14; Zink Dep., RE 115, PageID#3292:16-3293:22; Ort Dep., RE 113, PageID#3019:24-3020:8). Neither did Officer Cohn, who testified he "would just try talking to him through the cell, through the door … to avoid conflict." (Cohn Dep., RE 114, PageID#3139:4-12). When considering whether there was a need for Sgt. Snyder to use force, the Court must consider that Sgt. Snyder had no reason to even enter Mr. Guglielmo's cell, let alone use force.

b. Mr. Guglielmo posed no threat to Defendant Snyder

Once inside the cell, Sgt. Snyder asked Mr. Guglielmo to sit on a bench and Mr. Guglielmo complied. (Zink Dep., RE 115, PageID#3295:21-3296:21). Sgt. Snyder and Mr. Guglielmo spoke for a while, during which Mr. Guglielmo again asked about medical care and then they discussed their respective military service. (Zink Dep., RE 115, PageID#3296:25-3297:17). Defendant Snyder then called Mr. Guglielmo a faggot. (Zink Dep., RE 115, PageID#3297:18-3298:19). Mr. Guglielmo responded by standing up and saying, "I'm not a faggot." (Sears Dep., RE 109, PageID#2580:11-2581:6). Defendant Snyder then stepped forward, put his hands on Mr. Guglielmo's chest, and pushed him back down onto the bench. (Sears Dep., RE 109, PageID#2536:3-10; 2581:11-191). Once seated, Mr. Guglielmo defensively grasped Sgt. Snyder's left forearm. (Ort Dep., RE 113, PageID#3028:20-3029:3; Zink Dep., RE 115, PageID#3308:12-3309:9). Sgt. Snyder then began to strike Mr. Guglielmo. (Sears Dep., RE 109, PageID#2586:1-5).

Sears testified Sgt. Snyder punched Mr. Guglielmo in the gut, struck him with two uppercuts to the face, and used a forearm strikes. (Sears Dep., RE 109, PageID#2584:11-

2585:25). During at least one of the strikes, Mr. Guglielmo was not holding onto Sgt. Snyder's forearms. (Sears Dep., RE 109, PageID#2585:17-25). In response to Sgt. Snyder's assault, Mr. Guglielmo did not attempt to strike, punch, kick, smack, elbow, bite, spit, strangle or poke anyone in the eyes. (Sears Dep., RE 109, PageID#2546:21-2547:20; Zink Dep., RE 115, PageID#3311:25-3312:11). With Mr. Guglielmo in a seated position and being an older man, none of the officers in the cell felt he posed a risk of physical harm to Sgt. Snyder or any of the other officers. (Sears Dep., RE 190, PageID#2552:12-25; Zink Dep., RE 115, PageID#3290:11-3292:2, 3305:8-3307:24; Ort Dep., RE 113, PageID#3034:18-84:1). Because Mr. Guglielmo was not a threat, none of the defendants intervened to help Sgt. Snyder deal with Mr. Guglielmo. (Sears Dep., RE 190, PageID#2553:1-2554:6). They just stood there. (Video, MCJ 04_CAM 11, RE 119, 23:36:30-23:37:55). There are sufficient facts in the record for a jury to determine that Mr. Guglielmo did not pose a threat to Sgt. Snyder.

Sgt. Snyder's allegation that he used force in reaction to Mr. Guglielmo grasping his forearm is undermined by his fellow officers' testimony that Mr. Guglielmo did not threaten Sgt. Snyder. What happened here is the same thing that happened in *Pelfrey v. Chambers*, 43 F.3d 1034, 1037 (6th Cir. 1995), where a corrections officer advanced on an inmate and put his hand on the inmates' head. The inmate, feeling threatened, instinctively put his hand on his head as well. *Id*. at 1035. The officer responded by pulling the inmate's hand down to his side and pulling a knife on the inmate and cutting off some of his hair. *Id*. Even though the inmate put his hand on the officer, the Court found the officer assaulted the inmate "*for absolutely no reason*." *Id*. at 1037 (emphasis in original). Here, a reasonable jury could conclude that Sgt. Snyder advanced on Mr. Guglielmo and laid his hands on Mr. Guglielmo first, pushing him down onto the bench, and Mr. Guglielmo only instinctively grasped Sgt. Snyder's forearm. This

series of events explains why none of the officers felt Mr. Guglielmo posed a risk of harm to Sgt. Snyder. A jury could draw this reasonable inference and reach the same conclusion as the Sixth Circuit in *Pelfrey* – Sgt. Snyder assaulted Mr. Guglielmo *for absolutely no reason*.

c. The deadly force used was disproportionate to the alleged need to use force

The lack of any necessity for using force must be seen in relation to the amount of force used. It is undisputed that Sgt. Snyder struck Mr. Guglielmo in the head three times. According to Officer Ort, "No one has ever told us to – or taught us to perform a strike to someone's head." (Ort Dep., RE 113, PageID#2969:8-14). Montgomery County trains its officers that head strikes can be deadly. (Zink Dep., RE 115, PageID#3319:9-23; Sears Dep., RE 109, PageID#2624:8-12; Ort Dep., RE 113, PageID#2969:2-7).

Indeed, a closed-fist blow to the head "may constitute deadly force which is unreasonable unless 'the suspect threatens the officers with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm.'" *Sallenger v. Oakes*, 473 F.3d 731, 740 (7th Cir. 2007) (*quoting Tennessee v. Garner*, 471 U.S. 1, 11 (1985)); *see also Green v. New Jersey State Police*, 246 F. App'x. 158, 163 (3d Cir. 2007) (two head-strikes with flashlight could constitute deadly force); *Sanchez v. Hialeah Police Dep't*, 357 F. App'x 229, 233 (11th Cir. 2009) (five blows to the head with an ASP "could have been life-threatening"). Defendants agree that head strikes can be lethal. (Def. Mot. S. Judg., RE 123, PageID#3983). The fact that closed-fist strikes to the head can be deadly is confirmed by this case, considering Mr. Guglielmo almost died.

"The extent of a prisoner's injury may help determine the amount of force used by the prison official." *Cordell*, 759 F.3d at 580–81. Sgt. Snyder's blows to Mr. Guglielmo's head almost killed him. Mr. Guglielmo left the jail with a Glasgow Coma Score of 3, "the same score

you would get from a dead man." (Waldman Report, RE 129-1, PageID#4498). A rapid craniotomy "probably saved his life." (*Id*.). "This is a guy who almost died because of a massive acute bleed on his brain." (Gabriel Dep., RE 128, PageID#4355, 169:12-13). The fact that Mr. Guglielmo nearly died irrefutably indicates that Sgt. Snyder used deadly force.

Video footage and the testimony of the officers indicate that the use of force continued for forty-four seconds after Mr. Guglielmo released his defensive hold on Sgt. Snyder. This makes sense because it is "not possible" that two blows to the left side of Mr. Guglielmo's head could have caused the degree of injury he suffered. (Gabriel Dep., RE 128, PageID#4354-4355, 168:19-169:3). Forty-four seconds of continued unjustifiable force under these circumstances is a staggering amount of force. Defendants concede "[t]here is no question that Plaintiff's injury is traumatic." (Def. Mot. S. Judg., RE 123, PageID#3984).[26]

Plaintiff has presented sufficient evidence that the first *Kingsley* factor favors the Plaintiff because Sgt. Snyder had no reasonable basis for using deadly force.

2) Mr. Guglielmo's Injuries Indicate an Extreme Amount of Force Was Used

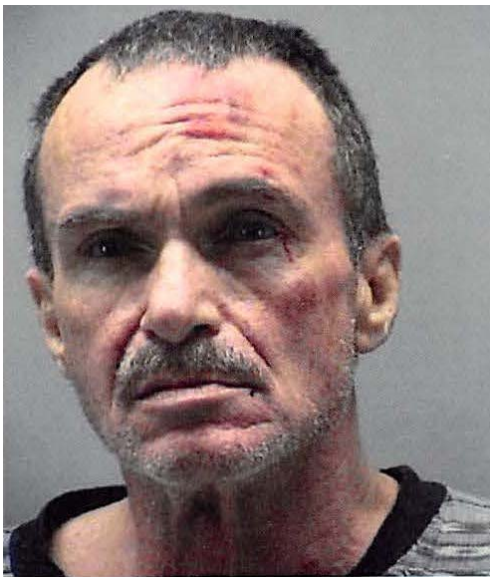
Courts should consider "the extent of the plaintiff's injury" to help determine whether a use of force on a pretrial detainee was reasonable. *Kingsley*, 135 S. Ct. at 2473. "The extent of injury suffered by an inmate is one factor that may suggest whether the use of force could plausibly have been thought necessary in a particular situation. The extent of injury may also provide some indication of the amount of force applied." *Wilkins v. Gaddy*, 559 U.S. 34, 37 (2010) (internal quotations omitted).

The night prior to Sgt. Snyder's use of force, Mr. Guglielmo was arrested at a homeless shelter. During the arrest, the police officers performed a takedown maneuver and Mr.

[26] Defendants cite Plaintiff's use of force expert claiming he testified that it is likely that three strikes caused Mr. Guglielmo's injuries. (Def. Mot. S. Judg., RE 123, 3980). This misrepresents Mr. Berg's testimony, who only testified that Plaintiff was injured by "multiple strikes." (*Id*. and testimony cited therein).

Guglielmo hit his head and cheek on the concrete floor. (Guglielmo Dep., RE 103, PageID#1743:1-1744:23). He was taken to the hospital, assessed by two doctors, and determined to only have a scratch on his forehead and released. (Traylor Dep., RE 106, PageID#2020:21-24, 1983:16-22). Below left is a picture of him right after his arrest. The picture below right was taken two hours later when he was booked into the jail:

Photo Taken by Dayton PD



Booking Photo

(Ex. 29, Arrest Photo; Ex. B, Booking Slip, GB000693). Twenty-three hours later, Sgt. Snyder used force on Mr. Guglielmo. After that beating, Sgt. Snyder took these photographs of Mr. Guglielmo as he was being treated by EMS at the jail:

(Ex. 31, Jail Injury Photo 1; Ex. 32, Jail Injury Photo 2). These photos demonstrate that what Sgt. Snyder did to Mr. Guglielmo was far far worse than Mr. Guglielmo banging his head on a concrete floor. As Dr. Gabriel testified:

> Based upon the injuries that Mr. Guglielmo suffered, a very large subdural with mass effect, severe neurologic deficit multiple, multiple facial fractures, that's equivalent force to -- and I think I mentioned earlier that's the same force as a motorcyclist who had been thrown going 90 miles an hour and did a face plant would have. That is the same amount of force that a person beaten with a baseball bat multiple times to the face and head would have. That is the same force that somebody that jumped out of a third story window and did a face plant on asphalt would have. So that's massive, massive trauma.

(Gabriel Dep., RE 128, PageID#4341, 114:3-15). Dr. Gabriel saw a patient with nearly the same injuries as Mr. Guglielmo the same month as his deposition, that patient was injured in a high speed major automobile accident. (Gabriel Dep., RE 128, PageID#4335, 92:4-15).

Upon arrival at the emergency room, Mr. Guglielmo underwent an emergency craniotomy. Dr. Alan Waldman reviewed Mr. Guglielmo's medical records, including the operative notes, and described Mr. Guglielmo's brain injury and surgery as follows:

> Mr. Guglielmo underwent a left craniotomy for evacuation of the acute subdural hematoma. His Glasgow coma scale at the time of starting the surgery continued to be 3 with poor respiratory efforts. A common technique was utilized in retracting the scalp and temporalis muscles exposing the cranium. Four burr holes were then placed, and

> they were subsequently connected allowing for removal of that portion of the skull and exposure of the dura and as described in the operative note "a significantly large subdural hematoma." They evacuated the hematoma and irrigated any areas that appeared to be bleeding such as concern for bleeding from the pial (middle dural layer) vessels. These were anticoagulated using an electrical cautery. Closure was uneventful and Mr. Guglielmo tolerated the procedure without complications. He was then taken to intensive care for recovery and postoperative treatment.

(Waldman Report, RE 129-1, PageID#4484). About a week after the craniotomy Mr. Guglielmo underwent facial surgery to repair his facial fractures. Dr. Waldman described Mr. Guglielmo's skull fractures and surgery as follows:

> Craniofacial surgery was performed on Mr. Guglielmo on 22 January 2015. The fracture of the frontozygomatic structure was reduced and held together with a plate and three screws. The fracture segment was described as quite large. The infraorbital rim and lateral orbit fractures were also repaired using a 1.5 em plate and three screws medially and three screws lateral to the fracture to stabilize the segment. It is to note that the cubital floor was reduced to just being many tiny pieces and this was not able to be reconstructed. The fracture of the anterior maxilla was spanned with a lattice plate and affixed with two screws laterally and two screws medially to prevent a sunken cheek. A fragment in this area would not reduce, so a piece of mesh stabilized with two screws were placed over the defect to hold it in place.

(*Id*.).

These facial fractures indicate an enormous amount of force was used by Sgt. Snyder. Dr. Waldman:

> It should be noted that the zygoma is an extremely strong structure as Dr. Traylor describes, it was built by our creator in the fashion of a Roman arch. The structure is extremely difficult to break, yet it was fractured in Mr. Guglielmo... The orbital floor in this case of his left eye is the bottom of the bony cavity in the skull which holds the eyeball. What the surgeons found were too many pieces that "this was not able to be reconstructed." How much force can be hypothesized to be delivered to the face of Mr. Guglielmo to essentially shatter the orbital floor of his eye to the point where it cannot be reconstructed and fracture probably the strongest bony structure of the entire skull and face, the Zygoma. The amount of force would be tremendous.

(*Id*. at PageID#4498-4499).

Defendants admit that Mr. Guglielmo suffered traumatic injuries. (Def. Mot. S. Judg., RE 123, PageID#3984). The man who left the Montgomery County Jail by squad was not the

same man who was booked in 24-hours earlier. He would never walk again. He became incontinent. His memory has eroded. He can no longer do math or write well. (Waldman Report, RE 129-1, PageID#4497). He lives in a nursing home, and in order to move close to his family it would cost over $5 million to get the care he needs for the rest of his life.

It is up to a jury to determine whether, given the amount of damage Sgt. Snyder did with his bare hands, the force was reasonable. Despite conducting over 40 depositions, exchanging thousands of pages of documents, and retaining the services of over 10 experts, neither party has found any evidence that the severe injuries to Mr. Guglielmo were caused by anything other than Sgt. Snyder's brute force.

3) Defendant Snyder Made No Effort to Temper or Limit the Amount of Force He Used

Another factor the Court should consider in determining whether the force used was reasonable is whether there was "any effort made by the officer to temper or to limit the amount of force." *Kingsley*, 135 S.Ct. at 2473. To weigh this factor, the Court should consider whether there is "evidence in the record that [the officer] made any effort to moderate the force he used." *Cordell*, 759 F.3d at 583–84. To make this determination, the Court should look beyond the officer's "bare assertion that he 'used the minimum amount of force necessary to control [the inmate].'" *Id.* Thus, it is appropriate for the Court to consider what other force options were available, but not chosen. Here, Sgt. Snyder chose to use head strikes, which can be deadly, and which Montgomery County trains its officers not to use.

In *Coley v. Lucas Cty., Ohio*, 799 F.3d 530, 541 (6th Cir. 2015), an inmate was squirming around and struggling as a Sergeant was attempting to remove his restraints. The inmate was "surrounded by multiple officers" and yet the Sergeant used a chokehold (another form of deadly force), which the court found was "excessive and impermissible," and "was clearly objectively

unreasonable." *Id*. Sgt. Snyder was also surrounded by other officers when he decided to strike Mr. Guglielmo in the head. (Snyder Dep., RE 107, PageID#2164:15-2165:15). When three or four officers encounter an unruly inmate who is not handcuffed, the procedure is to "get them on the ground and put them in handcuffs." (Sears Dep., RE 109, PageID#2629:2-21). Officer Ort agreed that "we had the ability to place him in the handcuffs" but Sgt. Snyder chose not to do that. (Ort Dep., RE 113, PageID#3063:5-16). Ort also testified that they could have handcuffed Mr. Guglielmo through the food port before even entering the cell, but they chose not to. (Ort Dep., RE 113, PageID#3068:8-17). This typical procedure was not chosen by Sgt. Snyder. Instead, he chose to repeatedly strike Mr. Guglielmo in the head, risking, and almost causing, Mr. Guglielmo's death.

4) Banging on a Cell Door Is Not a Severe Security Issue, and Mr. Guglielmo Complied with Defendant Snyder's Order to Stop

To determine whether Sgt. Snyder's use of force was objectively reasonable, the Court must also consider "the severity of the security problem at issue." *Kingsley*, 135 S.Ct. at 2473. Whether Mr. Guglielmo grasping Snyder's forearm was threatening or a defensive maneuver is a disputed fact and cannot be considered as the security problem Sgt. Snyder was attempting to resolve. The only undisputed security issue was Mr. Guglielmo banging on the cell door. His banging is visible in the video and the parties agree he was banging. However, an inmate banging on a cell door is not a severe security problem. (Banks II Dep., RE 60-1, PageID#517:7-518:5).

Mr. Guglielmo's banging was not unusual. (Sears Dep., RE 109, PageID#2519:15-24). Even Sgt. Snyder admitted that inmates banging on cell doors is typical in the jail, and what Mr. Guglielmo was doing was "just the typical banging." (Snyder Dep., RE 107, PageID#2116:23-

2117:19).[27] Kyle Chmiel agreed that there was nothing "particularly frustrating" about Mr. Guglielmo's banging. (Chmiel Dep., RE 116, PageID#3397:19-3398:1). When inmates bang on their doors, corrections officers are supposed to "try to talk to them and talk them out of it." (Sears Dep., RE 109, PageID#2452:13-16). Sgt. Snyder's goal was to get Mr. Guglielmo to stop banging, and he accomplished that goal before entering the cell door. For that reason, none of the officers who entered the cell with him saw any need to enter the cell. Mr. Guglielmo stopped banging when the corrections officers came to his cell door; he backed away from his door when told to; and he sat down on the bench when told to. Mr. Guglielmo banged on his cell door to get the attention of someone, and when officers arrived, he was compliant. At the time of the use of force, the only issue – Mr. Guglielmo's banging – had resolved, and it never was a true security issue.

5) <u>There Was No Objective Basis for Defendant Snyder to Perceive a Threat of Serious Bodily Injury or Death</u>

The Court must also consider "the threat reasonably perceived by the officer." *Kingsley*, 135 S. Ct. at 2473. Mr. Guglielmo was 57 years old and weighed 155 pounds. He was surrounded by four officers who were larger than him. Sgt. Snyder was 16 years younger and 60 pounds heavier. A jury could look at that alone and conclude that Sgt. Snyder could not reasonably perceive at threat from Mr. Guglielmo. That was the conclusion of the three officers in the cell. It was obvious that Mr. Guglielmo was not a threat to Sgt. Snyder. That is why none of them moved to assist Sgt. Snyder. A minimum qualification for a Montgomery County correction officer is to have the ability to protect others against physical assault. (Ex. 8, CO

[27] A good example of Defendants' failure to accept the facts in the light most favorable to Plaintiff is that they directly quoted Snyder about Guglielmo's banging, but left out the following underlined portion: "Q. What did you hear? A. Just the metal door banging distinctive -- sounds like he was banging on the plumbing chase, the toilet. There's a steel door over the toilet that contains the plumbing in between the two cells that's got a security latch on it and they bang on that, the metal toilets. <u>It just sounded like metal, just the typical banging.</u>" (Def. Mot. S. Judg., RE 123, PageID#3957).

Position Description). When asked whether he would ever stand by and do nothing if an inmate is threatening the safety of another officer, Deputy Sears testified "No. I would intervene." (Sears Dep., RE 109, PageID#2615:18-2616:1). Neither Sears, Zink, nor Ort intervened because Sgt. Snyder was not threatened by Mr. Guglielmo.

It was Mr. Guglielmo who was on the defensive. Sgt. Snyder pushed Mr. Guglielmo down onto a concrete bench in the corner of a jail cell. Mr. Guglielmo was cornered, and likely terrified. Sears testified that Mr. Guglielmo did not attack Sgt. Snyder. (Sears Dep., RE 109, PageID#2618:13-17). Sgt. Snyder admits that by Mr. Guglielmo grasping his forearm, it made it harder for Sgt. Snyder to strike him. (Snyder Dep., RE 107, PageID#2172:8-14). Grasping Sgt. Snyder's left forearm was a defensive maneuver and an ineffective one at that. Mr. Guglielmo still suffered a beating so severe he almost died.

Sgt. Snyder alleges Mr. Guglielmo tried to pull him into a wall and then tackle him. Sgt. Snyder was not actually pulled into a wall, tackled, or injured in any way. And these non-acts were not perceived as threatening by any of the witnesses in close proximity to the use of force. If the three officers in the cell observing this use of force concluded Mr. Guglielmo posed no reasonable threat to Sgt. Snyder, then a jury could also reach that conclusion.

Additionally, Sgt. Snyder's final blow to Mr. Guglielmo, when it is undisputed that Mr. Guglielmo was not touching him, was excessive. "Where an arrestee poses no threat to others and is not trying to escape, an 'unprovoked and unnecessary blow' violates the Fourth Amendment," or in other words, is objectively unreasonable. *Coley*, 799 F.3d at 539 (*quoting McDowell v. Rogers*, 863 F.2d 1302, 1307 (6th Cir. 1988)). During that undisputed blow, Deputy Sears testified that Mr. Guglielmo was seated on the bench, not lunging at Sgt. Snyder as Sgt. Snyder alleges. The fifth *Kingsley* factor favors the Plaintiff because Plaintiff has placed

sufficient facts in the record for a jury to conclude that there was no basis for Sgt. Snyder to perceive a threat from Mr. Guglielmo.

6) Mr. Guglielmo Was Compliant and Never Actively Resisted

The Court must also consider "whether the plaintiff was actively resisting." *Kingsley*, 135 S. Ct. at 2473. Mr. Guglielmo complied with commands to stop banging, to back away from the door, and to sit down. The only other command he was given was to "let go" after Sgt. Snyder called him a faggot, pushed him into the corner of the cell, and Mr. Guglielmo grasped Sgt. Snyder's left forearm in defense. Mr. Guglielmo complied and let go after less than 10 seconds. Sgt. Snyder admits to hitting him one time after Mr. Guglielmo let go, but the video evidence and witness testimony indicates he continued using force for forty-four additional seconds. Because Mr. Guglielmo complied with all commands, the sixth *Kingsley* factor indicates the force used was unreasonable.

7) Defendant Snyder's Use of Force Was Punishment

"*Kingsley* also reaffirms that pretrial detainees cannot be subjected to the use of excessive force that amounts to punishment, precisely because they cannot be punished at all." *Coley*, 799 F.3d at 538 (internal quotations omitted). In *Coley*, the Sergeant choked an inmate after "having had time to consider his options while escorting Benton to the medical cells, and while attempting to remove Benton's multiple restraints." The sergeant "chose to act in a manner that Plaintiffs plausibly allege was the product of frustration and anger, designed to punish and cause harm rather than a good faith effort to maintain discipline." *Id*. at 540–41.

There is sufficient evidence that Sgt. Snyder's use of force was punishment. Sgt. Snyder threatened to beat Mr. Guglielmo's ass even before going to the cell. He gathered a pose and a can of pepper spray. He entered the cell despite being urged not to. And when faced with a

compliant inmate, he provoked him to anger by calling him a faggot.[28] Sgt. Snyder hated working in the jail and didn't want to listen to Mr. Guglielmo bang on his door all night, so he used force out of frustration and anger rather than a good faith effort to maintain discipline. The Eleventh Circuit faced a similar case where "Officer Del Nodal told Sanchez in the car that if he broke the window, he would 'get his ass kicked,' indicating that Officer Del Nodal's subsequent use of force was not designed to prevent Sanchez from escaping or to protect himself or the public." *Sanchez v. Hialeah Police Dep't*, 357 F. App'x 229, 232 (11th Cir. 2009). In this case, a reasonable jury could conclude that Sgt. Snyder meant what he said when he stated at roll call that he was going to beat that crazy fucker's ass. And as Sheriff Plummer testified, beating an inmate's ass just because they are banging on a cell door is "totally unreasonable." (Plummer Dep., RE 74, PageID#1304, 55:24-56:2). Under *Kingsley*, it would amount to unconstitutional punishment.

8) Segmentation is Not Applicable in this Case Because Defendant Snyder Used Force with the Purpose of Punishing Mr. Guglielmo

Defendants argue that the Court should view the use of excessive force in segments using *Dickerson v. McClellan*, 101 F.3d 1151 (6th Cir. 1996). (Def. Mot. S. Judg., RE 123, PageID#3986). Defendants want to exclude from the totality of the circumstances analysis any fact about why Sgt. Snyder entered the cell. (Def. Mot. S. Judg., RE 123, PageID#3987). They go so far as to argue that all events that occurred before Mr. Guglielmo grabbed Sgt. Snyder's arms must be removed from the analysis. *Id*. Defendants' arguments are unpersuasive.

Sgt. Snyder's actions - gathering a show of force, planning a use of force but making sure it was not recorded, entering the cell for no reason, provoking a response from Mr. Guglielmo,

[28] Defendants argue that "the use of a derogatory term cannot create a constitutional violation on its own." (Def. M. Sum. Judg., RE 123, PageID#3985). This argument misses the point. Threatening to beat Mr. Guglielmo's ass and then provoking him by calling him a faggot are not independent claims, they are evidence that Sgt. Snyder was not reacting to a threat posed by Mr. Guglielmo but was carrying out his intent to punish Mr. Guglielmo by using force.

and shoving him down on the bench - show that Sgt. Snyder entered the cell out of frustration and with the intent to use force. Such evidence is relevant and must be considered in a use of force case because it shows Sgt. Snyder went to Mr. Guglielmo's cell with the intent to punish him. "The Due Process Clause protects a pretrial detainee from the use of excessive force that amounts to punishment," which "can consist of actions taken with an expressed intent to punish." *Kingsley*, 135 S. Ct. at 2473. The Sixth Circuit held in *Morabito* that "provoking an altercation with Morabito out of frustration with his repeated verbal outbursts and demands for medical treatment, ultimately slapping, tasing, and punching Morabito while he was pinned under two officers, does not constitute an objectively reasonable use of force." *Morabito*, 628 F. App'x at 358. Thus, Sgt. Snyder's frustration and provocation are relevant to this Court's excessive force analysis.

Defendants support their argument by citing *McDougland v. Timberlake*, No. 1:08-CV-744, 2010 WL 2572800, at *4 (S.D. Ohio May 27, 2010), *report and recommendation adopted*, No. 1:08CV744, 2010 WL 2572752 (S.D. Ohio June 21, 2010), where a plaintiff's excessive force claim was dismissed because Plaintiff did not demonstrate more than a *de minimus* use of force by the officer. (Def. Mot. S. Judg., RE 123, PageID#3987). Thus, *McDougland* is irrelevant to a segmenting analysis.

Dickerson's segmenting is inapplicable in this case that involves only one use of force by Sgt. Snyder – there is nothing to segment. In *Dickerson*, the officers entered the suspects house unannounced and then shot the suspect. The Sixth Circuit independently analyzed the reasonableness of each action – the search and the use of force. *Dickerson*, 101 F.3d at 1162. In this case, there is only one decision Sgt. Snyder made that needs to be analyzed: whether the force he used on Mr. Guglielmo was objectively reasonable.

Eliminating facts that prove the officer's intent to punish, which is part of the totality of the circumstances to be considered, is not appropriate. Sgt. Snyder's threat to beat Mr. Guglielmo's ass is evidence Sgt. Snyder did not go to the cell with the purpose of stopping the banging on the cell door, especially since Mr. Guglielmo stopped banging prior to Sgt. Snyder entering the cell. Sgt. Snyder entered with the purpose to punish Mr. Guglielmo for banging on the door. Further, there is testimony that Sgt. Snyder provoked the use of force by calling Mr. Guglielmo a faggot, and then initiated physical contact by pushing Mr. Guglielmo down. That evidence makes it reasonable for a jury to infer that Mr. Guglielmo grasping Sgt. Snyder's forearm was a non-threatening, instinctive, and defensive action. Claiming Mr. Guglielmo triggered this use of force by grasping Sgt. Snyder's left forearm is a failure to view the facts in the light most favorable to the Plaintiff. Where material disputes of fact exist regarding strikes to a plaintiff, segmentation "serve[s] no useful purpose … because a fact-finder will have to resolve factual ambiguities." *Howser v. Anderson*, 150 F. App'x 533, 536 (6th Cir. 2005).

D) Defendants Sears, Zink, and Ort Failed to Intervene

"Generally speaking, a police officer who fails to act to prevent the use of excessive force may be held liable when (1) the officer observed or had reason to know that excessive force would be or was being used, and (2) the officer had both the opportunity and the means to prevent the harm from occurring." *Turner v. Scott*, 119 F.3d 425, 429 (6th Cir. 1997).

1) Defendants Sears, Zink, and Ort Knew Defendant Snyder Was Using Excessive Force

Defendants Sears, Zink, and Ort admit they had reason to know that Sgt. Snyder was using excessive force. All three testified that they did not intervene because Mr. Guglielmo was not threatening harm to Sgt. Snyder and they admit that Sgt. Snyder used deadly force by repeatedly striking Mr. Guglielmo in the head. It has been clearly established since 1985 that the

use of deadly force is categorically unreasonable unless the suspect poses an "immediate threat" of "serious physical harm" to the officer or another. *Tennessee v. Garner*, 471 U.S. 1, 11 (1985). This maxim is fundamental to policing.[29] Sears, Zink, and Ort freely admit they watched Sgt. Snyder use deadly force when they felt Mr. Guglielmo was not threatening harm to anyone (let alone immediately threatening serious physical harm), in other words, they just stood there and watched a use of excessive force.

2) Defendants Sears, Zink, and Ort Had the Opportunity and Means to Prevent Mr. Guglielmo's Injuries

Defendants Sears, Zink, and Ort were in the jail cell with no obstructions between themselves, Sgt. Snyder, and Mr. Guglielmo. There was no physical barrier to them intervening to stop Sgt. Snyder's use of force. They also had plenty of time. The use of force lasted forty-nine seconds, during which Mr. Guglielmo was not touching Sgt. Snyder for forty-four seconds. Undoubtedly, this was sufficient time to intervene. In *Goodwin v. City of Painesville*, 781 F.3d 314, 329 (6th Cir. 2015), the Sixth Circuit found that officers had sufficient time to intervene and stop a 21-second tasing. Defendants dispute the use of force lasted forty-nine seconds, but even Ort, who testified "it happened very fast," admitted that he "potentially" could have physically stepped in and stopped Sgt. Snyder from striking Mr. Guglielmo. (Ort Dep., RE 113, PageID#3033:18-22, 3050:7-14). The officers were in close proximity to the use of force and had plenty of time to intervene and stop it.

3) Defendants Sears, Zink, and Ort Failed to Act to Prevent the Harm to Mr. Guglielmo

[29] Montgomery County's use of force policy states: "An employee may use deadly force only when he reasonably believes that the action is in defense of human life. This includes the employee's own life or in defense of any person who is in imminent danger of serious bodily injury." (Ex. 52, MCSO Use of Force, MC-001100).

Defendants Sears, Zink, and Ort admit they did nothing to prevent the harm to Mr. Guglielmo. The video of the outside of the cell confirms this, as they can be seen standing still just watching Sgt. Snyder's near-fatal beating of Mr. Guglielmo.

E) Defendant Snyder's Failure to Secure Medical Treatment for Mr. Guglielmo Was Deliberately Indifferent

The Fourteenth Amendment forbids jail officials from "unnecessarily and wantonly inflicting pain on an inmate by acting with deliberate indifference toward the inmate's serious medical needs." *Blackmore v. Kalamazoo Cty.*, 390 F.3d 890, 895 (6th Cir. 2004).[30] "A constitutional claim for denial of medical care has objective and subjective components." *Id.* (*citing Farmer v. Brennan*, 511 U.S. 825, 834 (1994)). "The objective component requires the existence of a 'sufficiently serious' medical need." *Blackmore*, 390 F.3d at 895. "The subjective component requires an inmate to show that prison officials have 'a sufficiently culpable state of mind in denying medical care.'" *Id.* at 895 (*citing Brown v. Bargery*, 207 F.3d 863, 867 (6th Cir. 2000)). It is "more than mere negligence" but something "less than acts or omissions for the very purpose of causing harm." *Blackmore*, 390 F.3d at 895-896. Under *Farmer*, "the official must both be aware of facts from which the inference could be drawn that a substantial risk of harm exists, and he must also draw the inference." *Farmer*, 511 U.S. at 837.

There is no dispute that Mr. Guglielmo had a serious medical need. Mr. Guglielmo was subjected to a brutal beating for over forty seconds. Mr. Guglielmo was already swelling and bleeding before Snyder left the cell. (Snyder Dep., RE 107, PageID#2180:13-24). His face was

[30] In the wake of *Kingsley*, both the Second Circuit and Ninth Circuit have applied a reasonableness standard to inadequate medical care cases. *Bruno v. City of Schenectady*, __ Fed.Appx.__ , 2018 WL 1357377, *2 (2nd Cir. 2018); *Gordon v. County of Orange*, __ F.3d. __, 2018 WL 1998296 (9th Cir. 2018). This approach is still an open question in the Sixth Circuit. *See Esch v. County of Kent*, 2017 WL 3046009 (6th Cir. 2017) ("we have never squarely decided whether the Fourth Amendment's objective reasonableness standard can ever apply to a plaintiff's claims for inadequate medical treatment"). This approach may not have been clearly established in 2015, but the Court should still recognize that the standard has changed and analyze Sgt. Snyder's actions using the reasonableness test explained by the Second and Ninth Circuits.

severely fractured in multiple places and a large hematoma formed in his brain, rendering him comatose. His injuries were objectively serious.

Sgt. Snyder knew a Mr. Guglielmo faced a substantial risk of harm. The harm was inflicted by Sgt. Snyder's own hands and he witnessed Mr. Guglielmo begin to immediately swell, bleed, and lose his balance. Despite knowing Mr. Guglielmo was seriously injured, when Sgt. Snyder left the cell, he did not radio for medical staff to check on Mr. Guglielmo. (Mills Dep., RE 118, PageID#3623:10-20). After some time passed, Deputy Sears told Sgt. Snyder to check on Mr. Guglielmo, but Sgt. Snyder did not. (Sears Dep., RE 109, PageID#2590:6-17). Sgt. Snyder did nothing until he ran into a nurse who was performing an unrelated task. (Mills Dep., RE 118, PageID#3623:10-20). At that time, Sgt. Snyder asked Nurse Mills to get an ice pack. (*Id*. at 3623:17-3624:13). Sgt. Snyder concealed from him that an inmate was injured. Nurse Mills' intention was to simply return with an ice pack and give it to Sgt. Snyder, so he did not bring the medical instruments he normally would to treat an inmate. (*Id*., 3583:9-22, 3584:3-8, 3579:25-3580:16). Without the instruments, Mills was not able to do a medical assessment beyond "talking to him" and "looking at him." (*Id*.). Sgt. Snyder did not tell Nurse Mills that he had used force on Mr. Guglielmo nor did he tell Nurse Mills that he had struck Mr. Guglielmo in the head. (*Id*. at 3591:3-17, 3624:14-3625:3). Nurse Mills was able to gather a little bit of information from Mr. Guglielmo at the cell, but during this conversation Sgt. Snyder was standing there, likely intimidating Mr. Guglielmo. At that point Mr. Guglielmo was not an accurate reporter of what happened to him since his symptoms were already setting in as is evident from the video, where he is unable to walk and falls to the ground. (*Id*. at 3591:8-13; Snyder Dep., RE 107, PageID#2191:4-19; Video, MCJ 04_CAM 12, RE 119, 23:57:43). After Mr. Guglielmo was moved to another cell, Sgt. Snyder requested medic Jack Saunders check on

Mr. Guglielmo, but misled Saunders by saying Mr. Guglielmo was having a possible seizure. (Saunders Dep., RE 108, PageID#2352:7-13). Sgt. Snyder made the intentional decision not to seek out medical care for Mr. Guglielmo's injuries from the assault and he made the intentional decision to withhold critical information about the cause of Mr. Guglielmo's injuries.

Sgt. Snyder's choices delayed Mr. Guglielmo's medical care. The risk of delaying medical care to a person with acute traumatic injuries is obvious. *Border v. Trumbull Cty. Bd. of Comm'rs*, 414 F. App'x 831, 838 (6th Cir. 2011) (visible head injury was evidence corrections officer knew of a substantial risk of serious harm). In delay of medical care cases, a plaintiff need not prove the "detrimental effect" of the delay when "the seriousness of a prisoner's needs for medical care is obvious even to a lay person." *Blackmore*, 390 F.3d at 899. In such cases, the plaintiff must only prove that "the delay alone in providing medical care creates a substantial risk of serious harm. When prison officials are aware of a prisoner's obvious and serious need for medical treatment and delay medical treatment of that condition for non-medical reasons, their conduct in causing the delay creates the constitutional infirmity." *Id*. In this case, the seriousness of Mr. Guglielmo's injuries was obvious and delaying treatment created a substantial risk of serious harm.

F) Montgomery County Ratified Defendant Snyder's Use of Force by Failing to Conduct a Meaningful Investigation

Montgomery County has an unconstitutional policy of allowing its corrections officers to use excessive force as seen by its pattern and practice of failing to meaningfully investigate uses of force and ratifying all (but one) uses of force by Montgomery County jail officers.

In *City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988), the court explained how a decision by the final policy maker reviewing incidents of alleged misconduct can bind a municipality:

> When an official's discretionary decisions are constrained by policies not of that official's making, those policies, rather than the subordinate's departures from them, are the act of the municipality. Similarly, when a subordinate's decision is subject to review by the municipality's authorized policymakers, they have retained the authority to measure the official's conduct for conformance with their policies. If the authorized policymakers approve a subordinate's decision and the basis for it, their *ratification* would be chargeable to the municipality because their decision is final.

Id. at 127 (emphasis added). In other words, when the final municipal policymaker reviews the employee's discretionary actions, he measures those actions against the municipality's official policies. If he approves the employee's actions and does not discipline or reprimand the employee, his approval is final and demonstrates that the employee followed official policy.

Ratification can occur when the final decision maker reviews and approves an officer's use of force or when the policymaker fails to meaningfully investigate the alleged unconstitutional conduct. *Wright v. City of Canton*, 138 F. Supp. 2d 955, 966 (N.D. Ohio 2001). Thus, a municipality cannot avoid liability for ratification by choosing to look the other way.

In *Wright*, the police chief of the City of Canton, who was its final policymaker regarding discipline and compliance with departmental policy, ordered an internal affairs investigation into a use of force incident. *Id.* The lead investigator interviewed seven witnesses but failed to interview the medical doctor to whom the officers using force had given contradictory stories. *Id.* at 960. Not interviewing this critical witness against the officers was "evidence showing the investigation was not designed to discover what actually happened." *Id.* at 966. The police chief ultimately approved the investigation and did not discipline the officers involved. The Court held that the chief's approval of the investigation and failure to discipline the responsible officers was a ratification of the officers' conduct, sufficient to make the city liable for that conduct. *Id.* *See also Rush v. City of Mansfield*, 771 F. Supp. 2d 827, 863 (N.D. Ohio 2011) (investigators

failure to interview involved officers indicated investigation not designed to discover what actually happened).

Wright based its reasoning on two earlier Sixth Circuit cases. In *Leach v. Shelby County Sheriff*, 891 F.2d 1241, 1248 (6th Cir. 1989), the Court held that "the Sheriff's failure to investigate this incident and punish the liable parties" in effect ratified those actions and adopted them as the county's own. In *Marchese v. Lucas*, 758 F.2d 181, 187-88 (6th Cir. 1985), the Court found that the sheriff had failed to conduct any "serious investigation" of the plaintiff's beating, and thus failed to identify any wrongdoing, much less punish any wrongdoers. The sheriff's "ratification" of his employees' actions was sufficient to make the county liable. *Id.* The theory of ratification as a way of showing municipal liability thus has deep roots in Sixth Circuit jurisprudence.

Montgomery County gives its officers carte blanche to report their uses of force in any manner they wish with the assurance that the County's investigation will not contradict their story. In other words, the County has systemically designed its investigations to adopt one officer's defense of his actions rather than conduct investigations that get to the truth of the matter.

Bryan Cavender, the internal affairs investigator in this case, testified that the use of force investigation process begins with the corrections officer who used force filling out a use of force form and a jail incident report and turning only that officer's statement in to the sergeant.[31] (Cavender Dep., RE 70, PageID#824, 18:18-19:14). The sergeant downloads any video and still photographs. (*Id*.). The Sergeant checks the incident report for grammatical errors and forwards it to the jail commander. (*Id*. at 824, 20:25-21:7). The report continues up the chain of

[31] If a Sergeant uses force, then the report is initially signed off on by the assistant jail commander. (Cavender Dep., RE 70, PageID#826, 29:9-16).

command until it reaches the Chief Deputy who can request an investigation. (*Id*. at 824-825, 21:13-24:5, 25:8-21). If an investigation is requested, then Internal Affairs will conduct the investigation. The Sheriff signs off on every investigation. (*Id*. at 825, 22:24-24:18). This process puts many eyes on the reporting of an incident, but the process is corrupt from the outset.

When a use of force happens, it is the official practice that only officers who are "directly involved" meaning they used force or issued some sort of command during the incident need to write a report. (Ort Dep., RE 113, PageID#2989:5-2991:19; Chmiel Dep., RE 116, PageID#3433:8-3437:15). But if an eyewitness officer just stands there and does nothing and says nothing, acting only as a witness to another officer's use of force, he is not required to write an incident report. (*Id*.). And even when multiple officers write incidents reports, "You try to specifically do what your part is." (Cohn Dep., RE 114, PageID#3164:5-3165:23; Sears Dep., RE 109, PageID#2570:10-2572:20). "It's just the jail practice" that if only one officer uses force and others witness it, there will only be one account documented of what happened. (*Id*.). As Deputy Sears testified, "I write what I did. Snyder writes what he did." (Sears Dep., RE 109, PageID#2572:14-20; Cohn Dep., RE 114, PageID#3165:4-9). If the incident is then referred for an internal investigation, the investigation's goal is to confirm the officer's account, not assess it.

In this case, Sgt. Snyder's incident report is the only contemporaneous account of what happened in the cell. Sears' incident report just says, "There was an altercation between the two." (Ex. 5, Incident Report, GB000030). Ort did not even write a statement. Sgt. Snyder's statement was read by both Ort and Sears before they were interviewed during the use of force investigation. (Sears Dep., RE 109, PageID#2573:22-2574:9; Ex. 25, Ort Interview, 4:14-25). Sears agreed Sgt. Snyder's report was "the only report [he] had to review that recited the facts of the use of force." (Sears Dep., RE 109, PageID#2573:22-2574:9). Detective Cavender, the

investigator, even says to Ort at his interview, "Prior to this interview, I provided you with a report to look over; is that correct?" (Ex. 25, Ort Interview Transcript, 4:14-25). And the third eyewitness, Officer Zink, who was not interviewed, read Sgt. Snyder's incident report before his deposition. (Zink Dep., RE 115, PageID#3243:1-13; Ex. 5, Incident Report).

In the internal interviews (taking place two-months after the incident), the investigators did not design an investigation that would discover all the facts to determine the truth; rather the investigators "simply cop[ied] on paper what [was] already known." (Berg Dep., RE 122, PageID#3778:23-25). Sgt. Eric Banks was told by the union representative who witnessed the internal interviews that "it was very apparent through the type of -- type of narrow questions that internal affairs were asking that they weren't looking to get to the truth of what actually happened, they were just wanting it to gel with Sgt. Snyder's version of events and close the thing out." (Banks I Dep., RE 48-1, PageID#352:12-353:3; Ex. 25, Ort Interview Transcript, 2:1-8). Banks was told the same thing by Deputy Sears. (Banks II Dep., RE 60-1, PageID#594:10-595:15).

The investigation was a "farce." (Banks II Dep., RE 60-1, PageID#594:10-13). Consider the following:

- Zachary Zink, who was in the cell during the use of force, either was not interviewed or was interviewed and the investigators did not record anything about it. (Zink Dep., RE 115, PageID#3350:2-3352:19; Cavender Dep., RE 70, PageID#834, 60:8-24).

- Sgt. Eric Banks was not interviewed despite being visible on the video checking on Mr. Guglielmo at 23:48. (Ex. 41, Internal Investigation Report, MC-000095). Sgt. Banks did not understand why he was not interviewed, he "was amazed by how small the group of people that were investigated in, especially – and with an incident where you had someone who was injured or someone whose condition was as bad as he was." (Banks II Dep., RE 60-1, PageID#594:10-595:15).

- Sgts. Whalen, Vitali, and Officer Campbell were not interviewed despite being responsible for placing Mr. Guglielmo in transport staging and giving pass-on information to Sgt. Snyder. (*See Generally* Ex. 41, Internal Investigation Report).

- Mr. Guglielmo was not interviewed. (*Id*.).

- Investigators completely ignored the contradictions uncovered in witness interviews and just adopted Sgt. Snyder's version of events:
    - Possibly learning from Zink that Snyder called Guglielmo a faggot but leaving his statement out of the investigation. (Zink Dep., RE 76, PageID#1536:3-17).
    - Finding both of Sgt. Snyder's arms were grasped when Ort told investigators only one arm was grasped. (Ex. 41, Internal Investigation Report, MC-000089; Ex. 25, Ort Interview Transcript, 8:9-11)
    - Finding Sgt. Snyder punched Mr. Guglielmo in abdomen when Ort said Sgt. Snyder did not. (Ex. 41, Internal Investigation Report, MC-000089; Ex. 25, Ort Interview Transcript, 9:1-4).
    - Never reconciled Sgt. Snyder's statement the incident was over in a matter of seconds with Sears' statement it lasted 20 seconds. (Ex. 41, Internal Investigation Report, MC-000105; Ex. 6, Sears Interview Transcript, 13:15-24; Cavender Dep., RE 70, PageID#838, 75:4-25).

- Despite these contradictions no second interviews were scheduled. (Cavender Dep., RE 70, PageID#828, 35:14-36:17).

- Investigators did not uncover (or record) that Sgt. Snyder said he was going to beat Mr. Guglielmo's ass and that Sgt. Snyder called him a faggot. (*See generally* Ex. 40, Feehan Interview Transcript).

- The investigators did not show the video of the outside of the cell to the witnesses in their interviews to establish a timeline. (*See generally* Ex. 41, Internal Investigation Report).

- The investigators never attempted to determine the extent of the injury suffered by Mr. Guglielmo beyond what was in Sgt. Snyder's incident report. (Cavender Dep., RE 70, PageID#843-844, 94:21-98:8; *See Generally* Ex. 41, Internal Investigation Report).

- Sheriff Plummer never determined whether Sgt. Snyder's use of force even caused Mr. Guglielmo's traumatic brain injury. (Plummer Dep., RE 74, PageID#1325, 138:17-139:4).

- The investigation found Sgt. Snyder did not violate the handheld camera policy, but then at deposition Det. Cavender admitted Sgt. Snyder did violate the policy.

(Ex. 41, Internal Investigation Report, MC-000112; Cavender Dep., RE 70, PageID#836-837, 69:23-72:1).

Sheriff Plummer, who made the final decision that Sgt. Snyder should not be disciplined, was personally committed to confirming Sgt. Snyder's story even when shown evidence contradicting it. (Plummer Dep., RE 74, PageID#1296, 24:20-25:3). When confronted with Sgt. Feehan and Sgt. Banks' testimony that Sgt. Snyder said he was going to beat Mr. Guglielmo's ass, Plummer testified, "I have no evidence that he said it. Based on his testimony he's not sure he said that either." (*Id*. at PageID#1304, 56:17-22). When confronted with Sears and Zink's testimony that they did not think Sgt. Snyder was at risk of any harm, Sheriff Plummer testified, "These guys can't speak for Sergeant Snyder's risk of harm. This is their opinion. Let's talk about his opinion because he was the one engaged in the situation." (*Id*. at PageID#1315-1316, 101:12-102:6). And then when asked whether he believes everything an officer who used force says about what happened, Plummer testified, "I do believe their testimony unless proven otherwise." (*Id*.). Like his investigators, Sheriff Plummer ignored all evidence proving otherwise.

The only reason that this incident was even investigated was because the major in charge of the jail, Scott Landis, recommended an investigation to Chief Deputy Streck. (Landis Dep., RE 131, PageID#4542:4-24; Ex. 71, Landis Memo). In his January 2015 memo, Maj. Landis stated "I believe there were Jail Manual policies and possibly General Order Manual policies that were violated." (*Id*.). Asked about this at deposition, he could not remember what policies he thought were violated, and even after reviewing the incident report he could not identify any. (*Id*.). When asked whether he had any idea why he requested an investigation, he answered, "I don't remember." (*Id*.).

It is undisputed that the investigation was not designed to uncover the truth. Plaintiff's expert opined that "[e]ven when they find conflicting information between one officer and another, particularly as it pertains to the number of punches used, where the punches were placed, the time between the punches, and how long the entire event takes, no one comes back and re-interviews anybody." (Berg Dep., RE 122, PageID#3778:5-11). The interviews were perfunctory – Brandon Ort, who witnessed the assault, was only interviewed for nine minutes. (Berg Dep., RE 122, PageID#3779:1-14). Sgt. Snyder's interview only lasted 22 minutes. (*Id.*; Ex. 47, Snyder Interview Transcript). Defendant's offered no expert opinions on the sufficiency of the investigation. (Eiser Dep., RE 127, PageID#4237, 35:1-23).

Considering the County's reporting and investigating practices, it is unsurprising that in Sheriff Plummer's 10 years as sheriff, he can only recall one incident where a corrections officer was disciplined for using excessive force. (Plummer Dep., RE 74, PageID#1311-1312, 85:24-87:11). That incident was caught on camera, and the black officer who was disciplined has publicly accused and sued the Sheriff alleging racism was involved in his discipline. (*Id.* at PageID#1329-1330, 157:21-159:12); *Wallace v. Montgomery County, et al.*, Case No. 3:17-cv-183, RE 14, Campbell Answer and Crossclaim (S.D. Ohio Aug. 21, 2017).[32]

In another case before this court, Montgomery County's attempt to create uniform statements was exposed. In *Hopper v. Phil Plummer*, 887 F.3d 744, 758 (6th Cir. 2018), Montgomery County argued to the Sixth Circuit that officers should be granted qualified immunity because "not every officer testified to hearing Richardson's complaints" that he could not breathe as officers pinned him to the ground in the prone position. Two inmates heard Richardson complain continuously for 22 minutes before he died, but only one officer out of nine

[32] See also Dayton Daily News, *Fired officer wants county to pay for his defense in civil suit* (Aug. 23, 2017), available at https://www.daytondailynews.com/news/crime--law/fired-officer-wants-county-pay-for-his-defense-civil-suit/srcWXCXWSXCBfKH461vu4J/ (last accessed 6/26/2018).

at the scene admitted that Richardson "may have said" he could not breathe. *Id*. at 749-750. In that case, none of the involved officers were even interviewed, no officer was disciplined, and Plaintiff's *Monell* claim that the County had not conducted a meaningful investigation survived the County's motion for summary judgment. *Hopper v. Montgomery Cty. Sheriff*, No. 3:14-CV-158, 2017 WL 495511, at *14 (S.D. Ohio Feb. 6, 2017), *aff'd in part, dismissed in part sub nom. Hopper v. Phil Plummer*, 887 F.3d 744 (6th Cir. 2018).

In this case, "the investigation really wasn't an investigation at all. It was just a regurgitation of the report that Snyder provided." (Berg Dep., RE 122, PageID#3777:16-19). This was by design, and as a result, Montgomery County is liable for failing to perform a meaningful investigation.

G) Montgomery County Has a Custom of Permitting Excessive Force in Its Jail

Montgomery County has a custom of allowing officers to use excessive force in their jail.

> The touchstone of the § 1983 action against a government body is an allegation that official policy is responsible for a deprivation of rights protected by the Constitution, local governments, like every other § 1983 "person," by the very terms of the statute, may be sued for constitutional deprivations visited pursuant to governmental "custom" even though such a custom has not received formal approval through the body's official decision making channels… "Congress included customs and usages [in § 1983] because of the persistent and widespread discriminatory practices of state officials . . . . Although not authorized by written law, such practices of state officials could well be so permanent and well settled as to constitute a 'custom or usage' with the force of law."

Monell v. Dep't of Soc. Servs. of City of New York, 436 U.S. 658, 690–91 (1978). Among other avenues, a plaintiff can prove municipal liability under 42 U.S.C. § 1983 by looking to "a custom of tolerance or acquiescence of federal rights violations." *Thomas v. City of Chattanooga*, 398 F.3d 426, 429 (6th Cir. 2005). Under such a theory, a plaintiff must show:

> (1) the existence of a clear and persistent pattern of illegal activity;
> (2) notice or constructive notice on the part of the defendant;

> (3) the defendant's tacit approval of the unconstitutional conduct, such that their deliberate indifference in their failure to act can be said to amount to an official policy of inaction; and
> (4) that the defendant's custom was the "moving force" or direct causal link in the constitutional deprivation.

Id. Montgomery County's custom of tolerating excessive force is shown by the history of the Defendant Officers' uses of force and the lack of consequences they faced.

1) Montgomery County Tolerated a Clear and Persistent Pattern of Excessive Force in the Jail

Michael Berg, a corrections expert, reviewed 120 uses of force by the named defendants in this case to determine whether any force used was excessive.[33] Mr. Berg has been working in corrections since 1972. For 25 years he worked for the Jacksonville, Florida Sheriff's department, most of those years as a jail administrator, where his job was to review use of force incidents and "ensure that that force was proper and lawful." (Berg Dep., RE 122, PageID#3710:5-8). He also served for 12 years as a commissioner on the Florida Governor's Commission on Criminal Justice Standards and Training where he reviewed "thousands of use of force incidents that occurred with police officers and correctional officers." (*Id*. at 3710:16-3711:8).

Mr. Berg's process involved reviewing the officer's description of a particular event – including the inmates' actions and the officer's response. (*Id.* at 3752:11-3753:13). He generally determined that minor uses of force, such as restraints by handcuffing and arm holds to be reasonable. (*Id*.). The incidents he considered to be unreasonable force were incidents where "the individual was under control" and yet the use of force continued with "fist strikes, knee

[33] Defendants' use of force expert reviewed Mr. Berg's report and testimony and agreed he has the background qualifying him to render opinions in this case. (Eiser Dep. RE 127, PageID#4273, 179:23-180:6). Defendants did not give their corrections expert the 120 incident reports to review and he testified he was not offering any opinions about the pattern and practice of using excessive force in the Montgomery County jail. (Eiser Dep. RE 127, PageID#4236, 30:8-31:6).

strikes, tasings, OC spray, restraint devices such as a restraint chair, and flashlight used as an attack weapon." (*Id.*). This manner of distinguishing between reasonable and unreasonable force is consistent with Sixth Circuit law on both *de minimus* force and the unreasonableness of using force on individuals who are no longer resisting. *See Leary v. Livingston Cty.*, 528 F.3d 438, 443 (6th Cir. 2008) ("not every malevolent touch by a prison guard gives rise to a federal cause of action.") (internal quotations omitted); *Aldini v. Johnson*, 609 F.3d 858, 867 (6th Cir. 2010) ("there is simply no governmental interest in continuing to beat an arrestee after he has been neutralized, nor could a reasonable officer think there is.") (internal quotations omitted).

Mr. Berg opined that the overall number of use of force incidents by the defendant officers was "extremely high." (*Id.* 3755:10-3757:8). "In the corrections business, we're taught to communicate with inmates and to resolve issues with inmates and to ensure that if those issues can't be resolved that the appropriate person is brought there that may be able to resolve the issue. Use of force isn't a be all, do all for jail management." (*Id.*). "Use of force is a last resort,"[34] he testified, and when Montgomery County looks at the number of use of force incidents by these officers, they should realize "something is not adding up" and determine why these officers are using force so much. (*Id.*).

Of the 120 uses of force in the jail he reviewed, Mr. Berg determined that 71 involved excessive force. (Ex. Berg A, Berg Report, p. 29). Sgt. Snyder used force 31 times in only one and a half years in the jail. (*Id.*). Of those incidents, 29 involved excessive force, or 93.5%. (*Id.*). Mr. Berg elaborated on six exemplar use of force incidents used as exhibits in the depositions.[35] One involved an inmate who was "taken to the ground, punched, and pepper sprayed because he refused to take his hands out of the pockets of his jail uniform and put on a

[34] Montgomery County written policy also states that "Jail staff must use force as a last resort in controlling inmates." (Ex. 9, Jail UoF Policy, MC-000778).
[35] The four involving Sgt. Snyder are discussed below.

suicide gown." (*Id.* at p. 30; Ex. 27, Jones Incident Report; Ex. 28, Jones UoF Report). This inmate was assaulted for being suicidal. Another incident involved an inmate who was slammed against the wall, taken to the ground, and pepper sprayed because he refused to remove his hood during booking. (*Id.*; Ex. 26 Middlebrook UoF Report). Neither inmate tried to harm anyone, yet they were brutally assaulted. No officer was disciplined in those two uses of force, nor any of the other 120. (*Id.*).

In Montgomery County, at the time of this incident, there was a clear and persistent pattern of corrections officers using excessive force. Among the defendants in this case alone, more than half of the uses of force they were involved in were excessive force. Under any conceivable standard, this is clear pattern of illegal conduct.

2) Montgomery County Was on Notice that Excessive Force Was Being Used in the Jail

Each of the excessive use of force incidents identified by Mr. Berg were reported to the Chief Deputy, Jail Commander, and the Training Center. (Ex. Berg A, Berg Report, p. 29). Sheriff Plummer testified that he shares his responsibility to make sure the use of force policies are being followed in the jail with a major (Jail Commander) and the chief deputy. (Plummer Dep., RE 74, PageID#1296, 22:1-7; Cavender Dep., RE 70, PageID#824-825). Because all 71 of the excessive use of force incidents identified by Mr. Berg were reported and reviewed by the Sheriff and/or his designees, Montgomery County was on notice that excessive force was being used in the jail.

3) Sheriff Plummer Approved All Uses of Excessive Force in the Jail

As noted above, in Sheriff Plummer's 10 years as Sheriff only one officer was disciplined for using excessive force. That one incident occurred after force was used on Mr. Guglielmo, so it is irrelevant to the analysis in this case.

4) Montgomery County Had Four Opportunities to Stop Defendant Snyder from Using Force on Inmates Who Were Banging on Cell Doors

Finally, Montgomery County had four opportunities to prevent this incident from happening by disciplining Sgt. Snyder for using excessive force on other inmates in nearly identical situations. In four separate incidents in the 14 months preceding this incident, Sgt. Snyder went to a cell because an inmate was banging on the cell door. (Snyder Dep., RE 107, PageID#2226-2239; (Ex. 48, UoF Incident Report – Hammad 11.13.13; Ex. 49, UoF Incident Report – Hammad 2.11.14; Ex. 50, UoF Incident Report – Rowe 3.5.14; Ex. 51, UoF Incident Report – McIntosh 11.15.13). He ordered each inmate to stop. (*Id.*). Each complied. (*Id.*). After obtaining compliance, Sgt. Snyder entered each cell. (*Id.*). Sgt. Snyder pepper sprayed each inmate. (*Id.*). Sgt. Snyder did not even allege these inmates took any action to justify the use of the pepper spray. Sgt. Snyder had established a well-known pattern of entering compliant inmates' cells just because they were banging on their cell doors and gratuitously using force on them. Each of these uses of force were reported and approved as within policy. (Snyder Dep., RE 107, PageID#2256:24-2257:21). The County, through the actions of the final decision maker, Sheriff Plummer, approved Sgt. Snyder's use of excessive force on inmates banging on doors.

Asked whether it is his standard operating procedure to enter inmates' cells if they are banging but then stop, Sgt. Snyder testified, "to control inmates in the jail that might hurt themselves or the property, yes, that's my standard operating procedure." (*Id.*) In none of the four incidents he reviewed at deposition, did the inmates harm themselves or property by banging on their cell doors. (Ex. 48, UoF Incident Report – Hammad 11.13.13; Ex. 49, UoF Incident Report – Hammad 2.11.14; Ex. 50, UoF Incident Report – Rowe 3.5.14; Ex. 51 UoF Incident Report – McIntosh 11.15.13). And neither did Mr. Guglielmo. In the 10 years prior to

this incident, no inmate ever damaged a cell door by banging on it. (Banks I Dep., RE 48-1, PageID#302:22-303:7, 284:19-24). This is the "exact purpose" why "jails are made out of steel and plexiglass." (Berg Dep., RE 122, PageID#3812:21-3813:11). Sgt. Snyder's concern for inmate injury or property damage is simply nonsense in these five cases, because each inmate stopped banging prior to Sgt. Snyder entering the cell. When they stopped, his manufactured concern evaporated.

It is undisputed that Sgt. Snyder routinely used force on inmates just because they were banging on their cell doors, even after they complied with commands to stop. His behavior was reported, well known, and approved as within policy. Montgomery County approved Sgt. Snyder's pattern and practice of using unreasonable force against jail inmates. Therefore, the County is liable for Sgt. Snyder's custom of using excessive force against Joe Guglielmo.

CONCLUSION

Defendants' motion for summary judgment must be denied because Defendants have not accepted the facts most favorable to Plaintiff. Furthermore, Plaintiff has submitted sufficient facts from which a jury could conclude that the individual defendants violated Mr. Guglielmo's right to be free from excessive force. Therefore, the individual Defendants' motion for summary judgment should be denied. The County is also not entitled to summary judgment since there are sufficient facts from which a jury can conclude the individual Defendants acted pursuant to the County's policy and custom that permitted excessive force to be used on inmates at the Montgomery County jail.

For the reasons stated above, this Court should deny Defendants' motion for summary judgment and allow the case to proceed to trial, as scheduled, on October 22, 2018.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 5, 2018, a copy of the foregoing pleading was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system. Parties may access this filing through the Court's system. I further certify that a copy of the foregoing pleading and the Notice of Electronic Filing has been served by ordinary U.S. mail upon all parties for whom counsel has not yet entered an appearance electronically.

s/ Adam Gerhardstein
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