Case No. 20-13562-EE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JESSICA ROGERS,

Plaintiff/Appellee,

v.

JOHN GADDIS and
MICHELLE BAUMAN,

Defendants/Appellants.

Appeal from the United States District Court
for the Northern District of Florida, Pensacola Division
Case No. 3:18-cv-00571-RV-EMT

RESPONSE BRIEF OF PLAINTIFF/APPELLEE JESSICA ROGERS

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CERTIFICATE OF INTERESTED PERSONS

Plaintiff/Appellee Jessica Rogers agrees with and incorporates the Certificate of Interested Persons and Corporate Disclosure Statement contained in the Initial Brief of Defendants/Appellants John Gaddis and Michelle Bauman, with one addition, as follows:

Robert L. Bronston, Attorney for Plaintiff/Appellee Rogers

STATEMENT REGARDING ORAL ARGUMENT

Appellants' Brief would seem destined for oral argument, but that is entirely illusory. The only way Appellants create the illusion of legal arguments is by impermissibly retelling the facts in a fashion 100% contradictory to the factual assessment of the district court. Interlocutory appeals of the denial of qualified immunity are strictly limited to challenging legal issues presented by the district court's assessment of the facts. But here, Appellants manufacture legal issues by a wholesale retelling of the facts. Such interlocutory appeals are routinely dealt with by dismissal for lack of appellate jurisdiction, or disposed of on the merits via unpublished, *per curiam* dispositions. *See, e.g.*, *White v. Mesa*, *infra* at x. At this stage, the Court should recognize this appeal for what it is – predicated 100% on factual recasting – and dispose of it without oral argument, giving credence to the district court's assessment: "I am very tempted to find the appeal frivolous or patently without merit." [ECF95, p.2]. No other litigant could secure oral argument in the face of these shortcomings, particularly where argument would prolong a stay and prevent the related claims from going to trial.

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JURISDICTIONAL COUNTER-STATEMENT

Appellants Gaddis and Bauman ("the Deputies") invoke collateral order interlocutory jurisdiction while ignoring *Johnson v. Jones*, 515 U.S. 304 (1995). *Johnson* is a jurisdictional bar to interlocutory appeals disputing "evidence sufficiency" and "which facts a party may, or may not, be able to prove at trial." *Id*. at 314-16. *Johnson's* tripartite rationale was that facts i) are ***not*** truly "collateral," ii) threaten piecemeal review, and iii) bog appellate courts in exhaustive record-review best left to district courts. *Id*. at 316-17. The Deputies disguise their war with the factual assessment by challenging the legal test for deliberate indifference. But their Brief (and, in particular, their 14-page recitation of the "facts" which fails even to cite, let alone adopt, the district court's understanding) shows otherwise. Their arguments are ***entirely premised*** on their actions being seen (impermissibly) in the light most favorable to the Deputies as "mere negligence," ignoring that the district court held these facts created a jury issue that the Deputies acted willfully and wantonly. The Deputies have forfeited interlocutory jurisdiction under *Johnson* and its Circuit progeny.

This Circuit applies *Johnson* to dismiss fact-bound interlocutory appeals. When the Court accepts jurisdiction, it evaluates such appeals strictly on the "Plaintiff's facts" or those set forth by the district court. What ***cannot*** be done – on pain of dismissal – is to recast the facts. There are three paths to enforcing *Johnson*.

First, cases ***outright dismiss*** for lack of jurisdiction. ***Second***, some cases permit substantive legal review restricted to legal issues given the district court's understanding of the facts – that is, they apply a "***jurisdictional straitjacket***" to the arguments. And ***third***, in rare instances where factual re-thinking is required because of a complete absence of district court factual recitation or obviously contradictory video evidence, the Court adjusts the factual base: "***Exceptional Factual Revisitation***." Option one or two applies here because revisitation does not apply – the Deputies have not even invoked it.

In choosing between those options, the first one, ***outright dismissal***, is more consistent with this Court's precedent. Several decisions prevent fact-disputing interlocutory appeals.[1] Most recently, in *White v. Mesa*, this Court dismissed appellants' appeal, noting "[s]ince the ***appellants' arguments depend on a determination of facts*** that they may, or may not, be able to prove at trial, we lack jurisdiction." *White*, 817 Fed. Appx. at 742.

The Deputies fare slightly better under the ***jurisdictional straitjacket*** approach -- considering their appeal on the merits rather than dismissal but using only the district court's facts. *Johnson* presaged this, noting "[w]hen faced with an argument

[1] *E.g.*, *White v. Mesa*, 817 Fed. Appx. 739 (11th Cir. 2020); *Ham v. Atlanta*, 386 Fed. Appx. 899, 905 (11th Cir. 2010); *Jolivette v. Arrowood,* 180 Fed. Appx. 883, 885 (11th Cir. 2006).

that the district court mistakenly identified clearly established law, ***the court of appeals can simply take, as given, the facts that the district court assumed when it denied summary judgment***." 515 U.S. at 319. *See also, e.g.*, *Hall v. Flournoy*, 975 F.3d 1269, 1271 (11th Cir. 2020) (emphasis added) ("factual sufficiency is appealable only if the facts are 'inextricably intertwined' with a legal question," and even if so, "[a]lthough we may independently review the record facts, ***we will not disturb a factual finding by the district court if there is any record evidence to support that finding.***") (emphasis added); *Stanley v. Dalton, Ga.*, 219 F.3d 1280, 1287 (11th Cir. 2000) (noting potential to review "intertwined" facts but stressing "[a]lthough we may independently review the record facts, we will not disturb a factual finding by the district court if there is ***any record evidence*** to support that finding.") (emphasis added). Construed this way, ***jurisdiction*** over the appeal would exist. But because the Deputies never rebut the district court's factual analysis to show it lacks record support, their substantive argument is forfeited.

Finally, there is a third category: ***exceptional factual revisitation***. Prototypically, this is where a district court provides ***no*** written evidentiary

assessment[2] or there is blatantly contradictory video.[3] Neither applies, nor have the Deputies suggested otherwise.

Because there are no recognized grounds for ***exceptional factual revisitation***, the Deputies' appeal should either be jurisdictionally ***dismissed*** or their arguments rejected under the ***factual straitjacket*** approach.

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[2] Thus, this Court found jurisdiction in *Moniz v. Ft. Lauderdale*, 145 F.3d 1278 (11th Cir. 2010), and used plaintiff's facts because the order had none. *See also Stanley*, 219 F.3d at 1287 (revisitation where "the district court did not adequately identify the facts").

[3] The Deputies may attempt to invoke the video-contradiction doctrine of *Scott v. Harris*, 550 U.S. 372 (2007), in order to circumvent *Johnson*. Although they have waived that argument by failing to raise it, we nevertheless address it here in order to preempt it. *Scott* created a narrow exception where videotape evidence "obviously contradicts" the plaintiff's account. *Pourmoghani-Esfahani v. Gee*, 625 F.3d 1313, 1315 (11th Cir. 2015). In *Scott*, a motorist was sideswiped off the road by a deputy on video. To avoid qualified immunity, the motorist's affidavit portrayed the chase as a Sunday drive *a la* "Driving Miss Daisy." 550 U.S. at 379-80. But the videotape revealed scenes instead redolent of Mad Max in "The Road Warrior" (*e.g.*, excessive speeds, swerving, running red lights, endangering others). *Id*. The Court deemed the videotape controlling because it obviously contradicted the plaintiff's version of the incident. The exception is inapplicable here, however, because the videotape not only doesn't "contradict" the district court's facts (much less "blatantly" or "obviously"), it confirms them.

STATEMENT OF THE ISSUES

1. Whether defendants, charged with continuous supervision over a suicidal inmate to prevent self-harm, are entitled to qualified immunity on plaintiff's deliberate indifference claims, where the district court determined that, while the decedent tried to kill himself nine times over a ninety-minute period, succeeding on the tenth attempt, defendants willfully and wantonly did absolutely nothing for him, instead surfing the internet and socializing.

2. Whether the law has been clearly established in this Court since at least 2005 that a jailor with subjective knowledge of a serious risk of suicide who takes no action to prevent it violates the constitution.

STATEMENT OF THE CASE

An "elementary principle" of summary judgment is that courts construe the record and inferences in the light most favorable to the non-movant and believe her evidence. *Patel v. Lanier County*, 969 F.3d 1173, 1178-79 & n.1 (11th Cir. 2020). The Deputies' factual recitation, however, "largely forges its own narrative, retelling events from [their] perspective." *Id*. at 1179 n.1. Their record description uses the most self-serving testimony, ignoring everything else. Thus, appellee offers not only this initial summary, but also refutes the Deputies' version.

A. Fran is Detained, Becoming Delusional/Suicidal

Jose Francisco Escano-Reyes ("Fran") was a construction worker educated at a U.S. high school. On January 7, 2016, authorities detaining Fran for a traffic violation discovered that he was in violation of immigration law. [ECF72-9, p.81, Exh. 4; 72-4]. He was detained at the Santa Rosa County Jail ("Jail"). [ECF72-3, p.9]. Incarcerated away from his young son for several months, his mental condition deteriorated. [ECF72-9, pp.39, 116, 125].

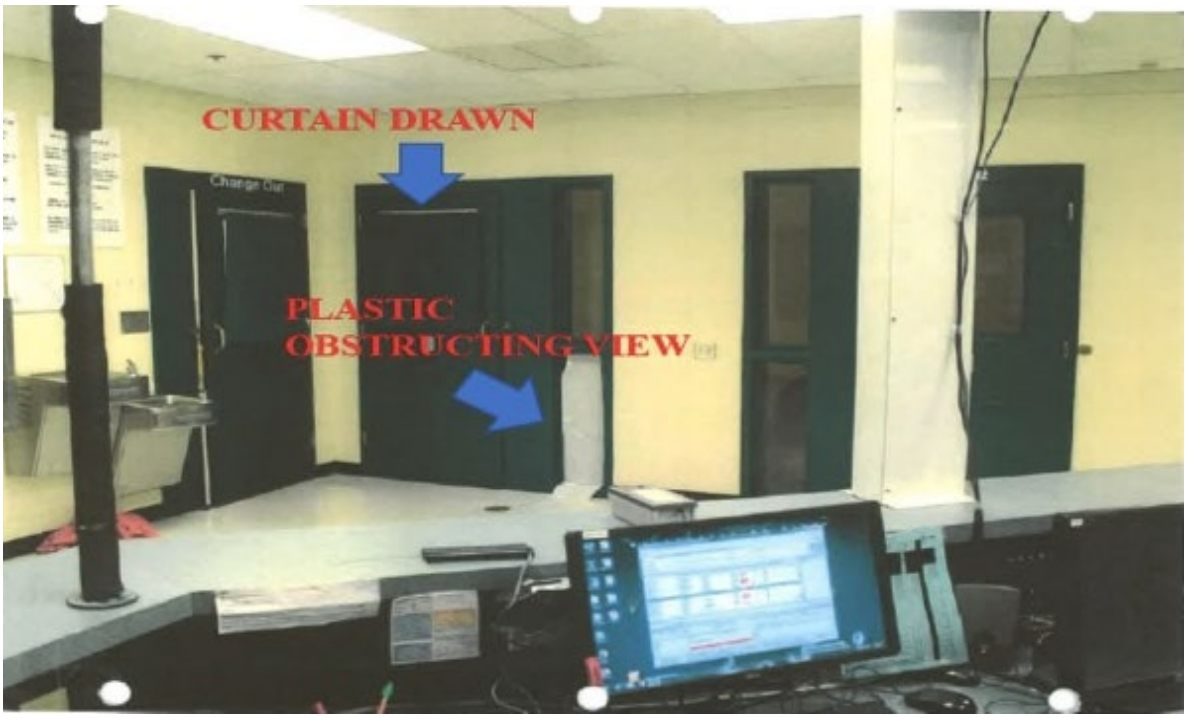
Fran became despondent, and on April 2, 2016, he was designated a suicide risk after stating that he needed to die and planned to kill himself. [ECF72-1, p.35]. He was placed onto a suicide watch protocol and housed in the Jail's medical unit. *Id*. From then until his death, Fran remained on 24-hour, so-called "direct-and-continuous-observation" protocol, which required deputies to make physical, visual checks and to fill out a "close watch log" certifying checks every fifteen minutes. [ECF60-2, pp.111-12, 173; 60-1, pp.49, 188-90, 203].

Fran's behavior became increasingly erratic/delusional. On April 3, he beat his fists against the door, causing bloody knuckles and swollen joints. [ECF72-1, p.33]. On April 5, Fran kicked and beat on the door. *Id*.

On April 6, Fran was moved from the medical unit to the Admissions, Classification, and Release ("ACR") unit. [ECF60-4, p.160]. A suicidal inmate was expected to be supervised identically (*i.e.*, 24-hour continuous observation with

staggered 15-minute physical checks) regardless of housing in the medical unit or ACR. [ECF60-1, p.132]. Fran was assigned cell number 1 in ACR ("ACR-1"), feet from the booking desk. ACR-1 was also the only cell in ACR with a metal partition capable of securing a ligature. *Id*. at 23-24.

The Jail covered the main windows of cell doors in ACR—including ACR-1—with a velcro curtain. A plastic bag obscured the bottom half of the smaller and narrower window running the length of the door, concealing naked inmates. [ECF60-2, pp.180-82]. The curtain and plastic obscured all but a small sliver of the cell's interior, making it impossible to view the full cell without walking to the cell door and peering through the small, uncovered, portion:



Late on April 6, Fran was "displaying unusual and erratic behavior" and "making delusional statements" such as "the camera is watching me" and "it will show the prophecies." [ECF72-2, p.9]. "His demeanor and behavior declined rapidly throughout the night. He began to scream, stating repeatedly that he needed to be killed." *Id*. Later, Fran began to violently "mule kick" the cell door, endangering himself. *Id*. Deputies repeatedly ordered Fran to stop, to no avail. *Id*. Fran was then put into a restraint chair. *Id*. He remained there from about 11:12 pm on April 6 until about 1:10 the next morning. *Id*. at 8-9. This episode, and the prior ones, were written up in "incident reports" (*see, e.g.*, ECF72-2), the substance of which was communicated to the Deputies. *See infra* at 6.

B. Deputies Bauman and Gaddis Assume Responsibility for Fran's Safety, Subjectively Understanding the Serious Risk of Self-Harm

On the morning of April 7, 2016, the Deputies began their shift at 6:45, when they gathered with other deputies for their daily briefing, called "muster." The Deputies knew that Fran was on suicide watch—and that they were responsible for supervising him. [ECF60-1, p.203; 60-4, p.41]. Thus, when they moved to the ACR area, both Deputies had a clear understanding that Fran had a serious medical need requiring them to take certain actions to ensure his safety. [ECF60-1, pp.55-56, 75, 81-83; 60-2, pp.91-93, 111-12]. Indeed, they understood that ensuring the safety of suicidal inmates is the Jail's "most significant" medical concern. [ECF60-2, pp.91-

92; 60-1, p.81]. And they both understood Fran to have a very real risk of suicide. [ECF60-2, pp.46, 91; 60-1, pp.82-83, 114-15].

Deputy Bauman previously knew that Fran was suicidal. She personally witnessed some of Fran's abnormal behavior, characterizing it as "yelling at the wall and exhibiting . . . consistent bizarre behavior," including "speaking of things that probably weren't there." [ECF60-1, pp.59-60, 65]. She had been aware for several days that Fran was on suicide watch. *Id*. Bauman worked at the Jail the day before and learned that Fran was on suicide watch and had been for the prior weekend. *Id*. at 56. She had also read an incident report that Fran was on suicide watch. *Id*. at 173. She therefore understood that Fran had a serious medical need (*id*. at 81-82) because of suicide risk (*id*. at 74), his threat to commit suicide, and his self-harming behavior. She knew this throughout the entire morning. *Id*. at 82. She accepted the medical professionals' conclusion that Fran was suicidal. *Id*. at 123. She knew that all persons deemed suicidal for whom she had responsibility required continuous monitoring. *Id*. at 49. And she understood that the 15-minute checks weren't some superfluous administrative function; she knew that ***medical professionals require*** 15-minute-interval checks as critical to preserve Fran's life. *Id*. at 123.

Gaddis first interacted with Fran on his April 7 shift. He learned during muster that Fran was on suicide watch. [ECF60-2, pp.55-56]. Gaddis had access to the prior incident reports regarding Fran's self-harming behavior and understood it

was helpful to review them but failed to do so. *Id*. at 157-58. Nevertheless, Gaddis's supervisor and others conveyed to him the gist of those reports during muster. [ECF60-3, pp.196-97; 72-6, p.16]. Gaddis knew because Fran was on suicide watch that a determination had been made that he posed a risk of self-harm and that somebody in medical determined a very real possibility of suicide. [ECF60-2, pp.90-91, 87]. He understood that suicide watch is the most significant concern in protecting inmates' safety. *Id*. at 91-92. He knew that close watch checks were required precisely because suicide-watch inmates posed a serious medical concern. *Id*. at 92-93. Gaddis testified: "Mr. Escano-Reyes had a ***right*** to be checked every fifteen minutes once he was on suicide watch," because "***it's obvious*** that an inmate who is placed on suicide watch and who is at heightened risk for suicide needs to be checked at least every fifteen minutes." *Id*. at 112 (emphasis added).

Gaddis knew that, from the chair where he spent all morning, he could only see the tiniest sliver of the partially exposed cell window. *Id*. at 120. But he nevertheless decided not to remove the obstructing screens; nor did Bauman. [ECF60-2, pp.180-83; 61-1; 72-11].

C. The Deputies Ignore Fran as He Screams, Attempts Suicide Nine Times, Then Successfully Kills Himself on the Tenth Attempt

Video of Fran's cell shows that when the Deputies started at 7, Fran was asleep, remaining so until 8:15. [ECF61-1]. At 8:25, Fran began screaming. *Id*. Fran continued screaming, more or less continuously, for the next hour, until 9:18.

[ECF60-2, p.55]. Fran was yelling in Spanish, so neither Deputy understood him. *Id*.; *see also id*. at 155. They remained willfully ignorant of the meaning; they knew that a deputy in the next-door medical area spoke Spanish but sought no translation. *Id*. Based on the length and intensity of the yelling, the fact that Fran started trying to kill himself while he was yelling, and the inference that the Jail spoliated the audiotape from ACR-1,[1] it is reasonable to infer that Fran's yelling was indicative of extreme distress.

If Fran was begging for help, it never came. When a suicidal inmate starts screaming, the Jail expects deputies to investigate. [ECF60-4, p.258]. The Deputies declined. Despite an hour of screaming, Gaddis was not at all concerned about what Fran was saying, even though he knew Fran was on suicide watch. [ECF60-2, p.55]. Gaddis admitted that Fran could very well have been screaming suicidal intentions. *Id*. at 52-53. Gaddis had no idea whether or not Fran was doing so, admitted that was entirely possible, and admitted that Fran could have been attempting to hurt

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[1] The Deputies claim that "[t]here is no audio recording of the ACR area on April 7, 2016." Br.10 n.5. That is a disputed fact. The Jail ***did*** record audio in the ACR as well as video. Captain Barbara Stearns, speaking officially on behalf of the Jail as its Rule 30(b)(6) representative, testified that she personally listened to the audio from the morning of Fran's suicide (ECF60-4, pp.125-28, 130-31), that she was provided a CD of the audio as "part of the inmate file" compiled on April 7, and that she listened to 25-30 minutes of the audio. *Id*. After speaking with counsel, however, she changed her story and claimed that there was no audio because the audio feed had mysteriously malfunctioned that day, although it had never malfunctioned before. *Id*. at 220, 129, 134. A jury is entitled to believe Captain Stearns's initial, uncoached, testimony.

himself, yet took no investigative steps. *Id*. at 53, 154-55. Bauman's response was yelling at Fran to "Stop it!" from her chair. [ECF72-3, p.155].

Had either Deputy bothered to walk the few feet to the window of ACR-1 and investigate why a suicidal man was screaming, they would have seen that, at 8:59, Fran removed his suicide smock and knotted it to the metal partition (ECF61-1), then put it back on. *Id*. They would have seen him remove the smock again at 9:08 and tie it around the partition, creating the deadly ligature. *Id*. They would have seen him attempting to choke himself to death, reaching into his toilet, and sticking his fingers down his throat. *Id*.

Fran stopped continually screaming at about 9:18, but to anyone minimally concerned for his safety, that silence would have been even more troubling. Over the following ninety minutes, Fran attempted suicide by inserting his head into the ligature ***nine times***. *Id*. On the tenth, at 10:25, he inserted his head into the ligature and hanged himself. *Id*. Had either of the Deputies exhibited the slightest effort or care for Fran's safety or his serious medical needs over this 90-minute period, they would have saved him. But they did not. Entrusted with "continuous observation" of a desperately delusional man, the Deputies ***literally did nothing***. Instead, Gaddis spent the morning reading ESPN and checking Facebook, Patriots.com, and his personal e-mail, while Bauman socialized, chatting with Gaddis and various passersby. [ECF60-2, pp.143-44, 189-91; 61-1]. Left to the Deputies, it is entirely

possible that Fran would still be hanging in ACR-1. But at 10:45, an inmate worker walked by, peered through the only exposed portion of Fran's window, and announced, "that guy's hanging." [ECF60-7, p.1].

D. The Deputies' Monitoring Efforts and the "Close Watch Log"

The Deputies had joint and equal responsibility for observing Fran, by conducting and documenting the physical checks every fifteen minutes. [ECF60-2, p.174; 60-1, pp.123, 128]. Despite this shared responsibility, the Deputies didn't have "an organized system in place" coordinating the duty; it was "sort of like *ad hoc*," and they "just kind of assumed it would get done." [ECF60-2, p.94; 60-1, pp.115, 192-94].

In addition to physical checks on Fran's safety at no greater than 15-minute intervals, the Deputies were required to contemporaneously document those checks on a "close watch log." The close watch log for Fran from the morning of April 7 contains 15 entries; parsing those shows just how seriously the Deputies took their subjectively-understood responsibility of safeguarding Fran's life.

The first five entries list times from 6:45 to 7:42 and contain a reference number of "951," indicating Gaddis made them. [ECF60-8; 60-2, p.48]. Those entries are fiction. Gaddis admitted that he fraudulently made them, never having undertaken even a minimal effort to confirm that Fran was ok. [ECF60-2, pp.48-51]. Gaddis believed that "the majority of the population is sleeping" then, so he

assumed that Fran was sleeping, deliberately indifferent to what Fran was actually doing. *Id*. at 48-49. Fraudulent entries are so commonplace at the Jail as to be euphemistically named "pencil whipping." *Id*. at 98. Thus, for the Deputies' first hour, neither did anything to monitor Fran. Because fraud is worse than mere inaction, they did less than nothing.

The next two entries on the form, listing times of 7:57 and 8:11, contain a reference number of "965," signifying Bauman. [ECF60-8; 60-1, p.90]. The video indicates that Bauman did walk over to Fran's cell at approximately those times and could have confirmed that he was not harming himself. [ECF61-1]. Those two entries are ***the only times*** all morning that either Deputy monitored Fran.

The next five entries (listing times of 8:25, 8:40, 8:53, 9:05, and 9:18) came from Gaddis. [ECF60-8]. They are coded "M," — Fran was shouting. *Id*. These checks correspond to approximately an hour when Fran was frantically screaming, and the Deputies failed to check on him. With physical checks, the Deputies would have seen that Fran had tied the ligature he ultimately used. [ECF61-1]. At deposition, Gaddis initially claimed that merely being able to hear Fran screaming every 15 minutes complied with the "continuous observation policy." [ECF60-2, p.41]. But later in his deposition, he admitted that he knew valid monitoring required a visual check. *Id*. at 94. He also admitted as much during the internal affairs investigation. [ECF72-3, p.17 ("Deputy Gaddis explained to me that ***these close***

watch checks require the deputy to physically observe the inmate.") (emphasis added)]. Gaddis also admitted that Fran could have been self-harming while screaming, that Gaddis would never have known, and he made no effort to check. [ECF60-2, pp.53, 154-55]. Clearly, remaining deliberately indifferent to whether a suicidal inmate is hurting himself cannot possibly satisfy a duty to continually monitor him for self-harm. Therefore, those five entries do not support the Deputies' claim of monitoring Fran.

The final three entries (at 9:32, 9:45, and 10:00) were also made by Gaddis and just say "DOOR," — not a listed "code." [ECF60-8]. Gaddis testified that he saw Fran at the window then. [ECF60-2, p.164]. But a reasonable jury could easily believe that these entries were just as fraudulent as the first five, for several reasons. First, the internal-affairs investigator (*see infra* at 14-15), determined that Gaddis could not have made a visual check from his location all morning. [ECF60-2, pp.109-10]. Second, viewing the videotape, the investigator determined that Gaddis ***never at any time that morning*** made a valid close watch. [ECF72-3, p.11]. Third, Gaddis does not dispute anything in the internal affairs report, ***effectively conceding that he did not perform any close watches that morning***. [ECF60-2, p.104]. Fourth, Gaddis's supervisor, Sergeant McPhail, ***also*** concluded that she did not at any time see Gaddis conduct a legitimate close watch on the videotape. [ECF60-3,

p.192]. A jury could easily accept this overwhelming evidence and disregard Gaddis's self-serving and contradictory assertions.

After 10:00, there are no close-watch entries, indicating that the Deputies never took any action to safeguard Fran during the last 45 minutes before he was found. Gaddis frankly admitted that he didn't observe Fran at any point after 10 and that, for all he knew, Fran was completely unobserved during that time. [ECF60-2, pp.138-39]. Bauman took the opposite approach, claiming with the benefit of hindsight that any time the videotape shows she glanced towards ACR-1 that she conducted a close watch. Specifically, to avoid the devastating conclusion that the Deputies simply disregarded Fran for over ninety minutes, Bauman pins her hopes on an alleged close watch at 10:25, when Fran briefly appeared in the sliver of window that was unobstructed. *See, e.g.*, Br.16-17&n.7. But a reasonable jury could disagree, for several reasons.

First, this Court has held in a nearly identical factual context that, when a jailor is charged with watching a suicidal inmate and claims to have made a check at a certain time but fails to record it in the official log, it must be assumed for summary judgment purposes that the check was ***not*** made. *See Cagle v. Sutherland*, 334 F.3d 980, 984 n.6 (11th Cir. 2003). Because the alleged 10:25 check appears nowhere in the close watch log, for summary judgment purposes it never happened. Second, Sergeant Wright concurred, noting that "[i]f it's not documented, it didn't happen."

[ECF72-6, p.109]. Third, Bauman did not concoct the "I checked him at 10:25" story until her deposition. Previously, when questioned during the investigation conducted days after Fran's death about why no checks appear on the log after 10, Bauman ***did not say that she had performed a check at 10:25***; instead, she said that ***she thought Gaddis was performing them***. [ECF72-3, pp.157-58]. Fourth, the internal affairs investigation definitively determined that no checks were made after 10: "[n]o one conducted any checks for 45 minutes, during which time an inmate was able to hang himself." [ECF72-3, p.18].

Bauman admitted that she was responsible for either performing the close watches or ensuring their completion. [ECF72-3, pp.149-50]. She knew that the chair where Gaddis sat all morning didn't permit a view into ACR-1. *Id*. at 150-52. She sat next to Gaddis all morning and was aware that he never left his chair until he went into Medical at 10:37. [ECF61-1]. She did not see Gaddis perform a check on Fran all day, and she did not perform any checks on Fran after 8:11. [ECF72-3, p.152; 61-1].

Under the governing summary judgment standard, no check took place at 10:25. Indeed, under that standard, no check took place at any time between 8:11 and 10:45, when an inmate discovered Fran hanging. Charged with continuous observation of a delusional/suicidal prisoner, the Deputies ***did nothing*** for ***over two-and-a-half hours*** while Fran screamed and repeatedly tried to kill himself,

succeeding only after it was obvious that no one would come to help or check on him.

E. The Internal Affairs Investigation and the Deputies' Concessions

After Fran's death, the Sherriff's Office conducted an internal affairs investigation. Lt. Shane Tucker officiated, swearing to its accuracy. [ECF72-3, p.21].

Tucker investigated the close watches. Based on the Deputies' sworn testimony, Tucker determined that:

- "if a deputy had completed the Close Watch form indicating a check had been performed, then it is a reasonable inference that the deputy had physically walked to that cell and looked inside to ensure the inmate's safety." *Id*. at 16.
- "Due to the inmate being identified as a suicide risk, . . . he was to be physically observed during staggered 15-minute checks to ensure his safety." *Id*. at 17; and
- "[W]hen a deputy completes the Detention Close Watch Form he or she is ultimately affirming that he or she personally conducted the close watch checks on the inmate and the inmate was found to be safe." *Id*.

As previously noted, the investigation determined that Gaddis couldn't see Fran from his seat at the ACR desk (*id*. at 18), and that Gaddis – who claimed to have performed ***13 of the 15*** close watches on the log, ***never performed any watch***

all morning. *Id*. at 11 ("In reviewing the video, I did not locate any time that Gaddis could be observed performing a close watch as he had indicated on the form."). Finally, it found that Bauman had responsibility for performing the checks as well (*id*. at 16-17), and that both Deputies had abdicated their duties for at least 45 minutes, directly resulting in Fran's death. *Id*. at 18.

The investigation concluded that "Deputy Gaddis had a clearly defined duty to physically observe and ensure the welfare and safety of Escano-Reyes. Furthermore, he was ***well aware of this duty***. Because he ***intentionally ignored this obligation***, Deputy Gaddis is guilty of willfully neglecting his duties." *Id*. at 17 (emphasis added). The Report finds Gaddis guilty of Untruthfulness Not in an Official Proceeding and Willful Neglect of Job Duties. *Id*. at 18. Bauman was found guilty of Disregarding Job Duties by Neglect. *Id*.

The Deputies also made several important concessions about their conduct. Gaddis admitted that, by failing to perform proper close watch checks, he failed to demonstrate regard for Fran's life. [ECF60-2, p.100]. He admitted he used no care in connection with the skipped checks. *Id*. He admitted Fran had a right to be checked every fifteen minutes once on suicide watch, and that Gaddis did not do that. *Id*. at 112. He admitted deliberately and knowingly failing to make the required checks (*id*. at 113-14), that no corrections officer would find it acceptable to leave a suicidal inmate unchecked (*id*. at 111-12), and that he willfully neglected his job

duties. *Id*. at 105. And he acknowledged that, had he actually bothered to perform the required checks, he would have seen Fran attempting to kill himself; he is "100 percent" sure. *Id*. at 156.

Knowing experts had deemed Fran a suicide risk for the entirety of his shift, Gaddis admitted that he disregarded their instructions for providing medical attention to Fran. *Id*. at 188. He also admitted to disregarding Fran's diagnosed medical needs. *Id*. at 193.

Bauman admitted that she willfully neglected her job duties that day. [ECF60-1, pp.164-65]. She admitted that the job duties she willfully neglected were required for public safety. *Id*. at 165. She agreed that she did not show tremendous regard for human life that day. *Id*. at 168-69. She admitted that she did not comply with her obligation to check Fran every 15 minutes (*id*. at 106) and that, at least as to the check that should have been performed at 10:40, she willfully neglected to conduct it. *Id*. at 212. She admitted that, had she made it, she would have seen him attempting to hang himself, and could have prevented him from dying. *Id*. at 166. Looking back, she also believes she willfully neglected other responsibilities. *Id*. at 223-24.

F. The Deputies' Credibility is Shattered

Because the Deputies' arguments depend on a jury believing their self-serving descriptions of their states of mind, their credibility is directly relevant. They have

none. The record is replete with instances of the Deputies testifying to things that are either demonstrably false or overwhelmingly contradicted by other aspects of the record, including their own prior testimony.

Take, for instance, Gaddis's characterization of his performance of the close watch checks. Recall that Gaddis committed fraud on the log and that the videotape conclusively reveals (and the internal affairs investigation expressly found) that Gaddis was ***never*** in a position to make a meaningful check. Nevertheless, initially at least, his testimony was as follows:

"Q. Is it your testimony . . . that he was, Jose Escano-Reyes was checked in accordance with the policy that was in effect at the Santa Rosa County jail on April 7th, 2016?

A. Yes.

Q. That policy was followed completely?

A. Yes.

Q. Okay. No deviation whatsoever from the policy?

A. No.

Q. Okay. And absolutely nothing done wrong?

A. No."

[ECF60-2, pp.40-41]. When confronted with his various lies, Gaddis would eventually walk back each and every one of those claims and admit that he showed

no regard for Fran's life. *See supra* at 15-16. But a jury could conclude, based on Gaddis's demonstrated penchant for fraud on the close watch log and his willingness to commit bald-faced perjury in this passage, that Gaddis's self-serving descriptions of his own mental state lack credence.

In an act of breathtaking mendacity, the Deputies' Brief cites ***to the above self-evidently-perjurious exchange*** as alleged support for their representation that "[a]t that time, Gaddis believe [*sic*] that hearing Escano-Reyes yelling was sufficient for observation purposes." Br.10. The truth, however, is the direct opposite; Gaddis knew perfectly well that observation required visual, not auditory, checks. [ECF60-2, p.94]. Indeed, he ***twice*** told the investigator that close watch checks must be visual. [ECF72-3, at 167 ("[Q.] Tell me about close watches, what they are & how they are performed. [A.] ***Visually insuring*** that the inmate that is on close watches present & alive. Supposed to be checking on them not to exceed 15 minutes") (emphasis added); *id*. ("It has to be done in person. A physical check.")].

So too with Bauman. For her, the credibility issues center on her attempts to turn an after-the-fact, videotape-viewing-enhanced allegation that it was theoretically possible for her to glimpse Fran in his cell window if she were paying attention into a legitimate close watch check. *See, e.g.*, ECF60-1, p.133 ("Well, I saw him multiple times, I just didn't write it down."); *id*. ("the last time I saw him was 10:25"). Because Bauman is staking her entire defense on that alleged 10:25

check, it is important for the Court to understand the full extent to which it is a *post-hoc* fabrication.

First, although Bauman later claimed certainty in her sighting of Fran at 10:25, she initially equivocated:

"Q. I'm watching this video, almost as we speak, I just watched ***from 10:15 to 10:30***. And from what I see, you are staring the polar opposite direction from the cell for the entirety of that window of time. Do you disagree with me?

A. No.

Q. Then how'd you check?

A. I think it's fair enough to say ***I could have seen him out of the corner of my eye. I don't have a direct memory of this.***"

[ECF60-1, p.150 (emphasis added)]. Second, as previously noted, when questioned during the investigation, Bauman ***never*** claimed that she conducted a close watch check at that time; to the contrary, she ***admitted that no checks were performed from 10-10:45*** but said she assumed Gaddis had been doing them. [ECF72-3, pp.157-58 ("[Q.] Approx 10:45 that there is trouble in Holding Cell 1. The last check was documented 45 minutes prior to that . . . Were you aware at that time that checks weren't being done? [A.] I wasn't. I thought, I still thought Gaddis. I guess just because he had been doing them.")]. Third, based in part on that testimony, the

investigation report concluded that no checks had been made after 10. [ECF72-3, p.18].

Bauman's credibility issues also extend to her appellate brief. As part of her effort to convince the Court she was subjectively unaware Fran was suicidal, she represents that "there is no indication" that she "had seen any incident report regarding Escano-Reyes." Br.7. No indication, that is, other than the fact that ***Bauman herself testified, under oath, at least three times*** that she ***had*** seen such a report. *See, e.g.*, ECF72-3, p.156 (Bauman: "I read a report that said he wanted to kill himself."); 60-1, p.201 ("Q. You were aware prior to the time Mr. Escano-Reyes killed himself that he had threatened to commit suicide; correct? A. Yes. Q. Okay. In fact, I believe you said that you read that in a report? A. Right."); *id*. at 173 ("Q. I believe you said that you saw a report in your statement that he was placed on suicide watch. A. Right.").

G. Proceedings Below

Plaintiff Jessica Rogers ("Rogers") sued on behalf of Fran's minor child, including claims against the Deputies in their individual capacities under 42 U.S.C. §1983, a *Monell* claim against the Sheriff, and various state-law claims. Following discovery, the Deputies and the Sheriff sought summary judgment.

The district court, the Honorable Roger Vinson, carefully reviewed the entire record, including watching the jailhouse video and reading the Deputies'

depositions, as well as other materials. [ECF85, p.3]. After an extensive recitation of the relevant facts (*id*. at 3-15), including detailed summaries of the subjective understandings of both Gaddis (*id*. at 11-13) and Bauman (*id*. at 13-14), Judge Vinson denied the motion.

He began his analysis by noting "some cases are close on summary judgment, so they require lengthy analysis. This one isn't, so it doesn't." *Id*. at 15. Based on the totality of the record on the close watches, the court concluded "a reasonable jury could find that ***the Deputy Defendants did not see Fran standing at his door at any point during this period of time*** [*i.e.*, between 9:00 and 10:45]." *Id*. at 9 n.4 (emphasis added). After reciting the three elements of deliberate indifference, the court found "[t]he plaintiff has easily proven these three facts for purposes of summary judgment. The Deputy Defendants have testified that they subjectively knew that Fran had a risk of serious harm and they admit to disregarding and 'willfully neglecting' that risk, thereby violating his constitutional rights." *Id*. at 16. Judge Vinson also held that all three routes for clear establishment were met: "Whether based on a materially similar case on point . . . or the obvious clarity exceptions, I have no difficulty concluding that what the Deputy Defendants allegedly did in this case (or, more accurately, what they ***didn't*** do) violated Fran's clearly established constitutional rights." *Id*. at 17 (emphasis original).

Regarding the Deputies' subjective mental state, Judge Vinson was also clear: "In light of the testimony from the Deputy Defendants described above, a reasonable jury could find that they acted with recklessness or willful and wanton disregard for Fran's safety and well being." *Id*. By parsing the definitions of "willfully" and "wantonly," the court emphasized that the Deputies had acted "with a conscious and intentional indifference to consequences and with the knowledge that damage is likely to be done." *Id*.

The Deputies noticed an interlocutory appeal, then sought a stay. The standard calls for a stay unless the appeal is frivolous. Judge Vinson remarked: "Although I am very tempted to find the appeal frivolous or patently without merit, I leave that determination for the Court of Appeals." [ECF95, p.2]. He also did not mince words about the Deputies' strategy (fully implemented here) of mischaracterizing his ruling: "To be clear, my summary judgment order didn't hold that suicidal inmates need to be 'observed at specific intervals,' nor did it hold that there is a 'constitutional right to continuous observation.'" *Id*. at 2 n.1.

Judge Vinson went on to state: "[A]s detailed in my order, there is evidence that Fran was screaming and had made no less than nine suicide attempts in the approximate hour and a half before he killed himself, during which time the Deputy Defendants remained seated in their chairs (surfing the internet and/or socializing with others) mere feet away." *Id*. "Even if the deputy defendants are correct that

they were only required to do 'something . . . at some point,' ***a reasonable jury could find on this record that they quite literally did nothing until another inmate found Fran hanging***." *Id*. (emphasis added).

The Deputies appealed.

SUMMARY OF ARGUMENT

For at least 15 years, it has been clearly established in this Court that detention deputies caring for a known-suicidal inmate on suicide watch are potentially liable under Section 1983 for a Fourteenth Amendment deprivation to the extent they do nothing to safeguard that inmate's life. Those were the jury-submissible facts as determined by Judge Vinson below.

He correctly denied qualified immunity because, as he put it, this case "isn't close." A reasonable jury could find that Fran had a serious medical need by being delusional/suicidal, that both Deputies subjectively understood Fran had that need, and that both Deputies understood frequent in-person monitoring was required by medical professionals to safeguard Fran's life. Sitting fifteen feet from Fran's covered-up cell, the Deputies made no effort to remove the obstruction, knowingly falsified logs, and literally ignored Fran for two-and-a-half-hours, instead surfing the internet and socializing. Their complete inaction resulted in nine grotesque suicide attempts and a successful tenth. If Judge Vinson's detailed assessment were not

sufficient, the Deputies admitted liability in their deposition testimony – knowingly disregarding the medical instructions that would have saved Fran's life.

The Deputies try to create a *faux* intra-circuit conflict over the wording of the test for deliberate indifference because some decisions refer to "more than mere negligence," whereas a later-evolved formulation uses "more than gross negligence." There is no conflict. Multiple panels of this Court have stated the different formulations represent a distinction without a difference. They are equivalent because both come only after a first element requiring subjective knowledge. Furthermore, the district court correctly cited the first-in-time case, and the question is not presented here because the court's assessment of the evidence is that it would exceed the standard the Deputies urge. They want to parse the difference between "mere" negligence and "gross" negligence when the district court pegged their culpability to the wanton and willful level. This is akin to asking the Court to rule whether the legal standard for a nuisance results from an amplifier volume being set to 7 or 8, when the facts show this one goes to 11.

The Deputies also claim that the semantic differences they cultivate mean that they did not violate a "clearly established" constitutional right. Their argument is waived because their summary judgment papers adverted only to clear establishment in a way, and with authority, that is utterly abandoned on appeal. Moreover, the district court held that the law was clearly established by both obvious clarity and

this Court's prior precedent in *Snow*, which is directly on point. When viewed in the proper factual light, the Deputies' conduct has been clearly unconstitutional for decades.

The Deputies apply self-serving spin to the record (when not completely ignoring it) by characterizing their actions as mere negligence. This is unavailing. It violates the longstanding jurisdictional constraints in *Johnson*, summary judgment standards, and the record below.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY DENIED SUMMARY JUDGMENT ON DELIBERATE INDIFFERENCE

The denial of summary judgment on qualified immunity correctly rested on the holding that non-movant Rogers met her burden: she created jury-submissible issues on whether the Deputies violated Fran's clearly-established constitutional rights with respect to her deliberate indifference claims. *Morton v. Kirkwood*, 707 F.3d 1276, 1281 (11th Cir. 2013). The Deputies argue that the district court erred in its articulation and application of the deliberate indifference culpability standard. Not so, as we explain. Moreover, their claims fail for a second, independent reason: they require impermissibly construing the record in the Deputies' favor.

A. The District Court Correctly Stated the Governing Standard

The court correctly noted that deliberate indifference requires: "'(1) subjective knowledge of a risk of serious harm; (2) disregard of that risk; and (3) by conduct

that is more than mere negligence.'" [ECF85, p.16 (quoting *Brown v. Johnson*, 387 F.3d 1344, 1351 (11th Cir. 2004))]. The Deputies exploit a variance in different panels' articulation of the third element. *Compare McElligott v. Foley*, 182 F.3d 1248, 1255 (11th Cir. 1999) (disregard "by conduct that is more than mere negligence") *with Townsend v. Jefferson City*, 601 F.3d 1152, 1158 (11th Cir. 2010) (disregard "by conduct that is more than [gross] negligence") (brackets original). From that difference, the Deputies assert Judge Vinson "applied the wrong standard." Br.27.

In fact, it is the Deputies who are wrong. The purportedly-different-standards issue isn't even presented here, as the record supports liability at a culpability level far beyond that championed by the Deputies. But the underlying claim also fails. It misunderstands prior precedent as creating competing standards when no substantive difference between the two articulations exists – a point made repeatedly even by panels of this Court applying the Deputies' preferred formulation. To the extent it were necessary to choose, the district court's version must be adopted, both because it is based on this Court's earliest precedent and because it is truer to *Farmer*.

1. The alternative formulations of the deliberate indifference standard represent a distinction without a difference.

The Deputies assert, without meaningful analysis, that the "more than mere negligence" formulation "is, without question, the wrong standard." Br.25. It would

be disconcerting if dozens of this Court's cases – not to mention countless cases in the Circuit's district courts – have routinely applied an incorrect standard. Happily, they haven't. A close analysis of the competing formulations indicates that they are the same; they call for identical levels of scrutiny.

a. The deliberate indifference three-prong test

This Court's articulation of the three-element deliberate indifference test originated in *McElligott*, summarizing the law in *Estelle v. Gamble*, 429 U.S. 97 (1976), and *Farmer v. Brennan*, 511 U.S. 825 (1994). "[D]eliberate indifference has three components: (1) subjective knowledge of a risk of serious harm; (2) disregard of that risk; (3) by conduct that is more than mere negligence." 182 F.3d at 1255. The Deputies argue that the standard they prefer resulted after "two panels of the Court . . . returned to the foundational caselaw on the subject, *Farmer v. Brennan*." Br.21. In other words, both of the alternate formulations derive from *Farmer*, so that is the key.

b. *Farmer*'s culpability requirement

In *Farmer*, the Supreme Court clarified that deliberate-indifference culpability attaches only when a defendant acts recklessly. *See, e.g.*, 511 U.S. at 836 ("With deliberate indifference lying somewhere between the poles of negligence at one end and purpose or knowledge at the other, the Courts of Appeals have routinely equated deliberate indifference with recklessness."). But that only began the

analysis because there are two different variants of recklessness: "The civil law generally calls a person reckless who acts or (if the person has a duty to act) fails to act in the face of an unjustifiably high risk of harm that is either known or so obvious that it should be known." *Id*. (citing secondary authority). "The criminal law, however, generally permits a finding of recklessness only when a person disregards a risk of harm of which he is aware." *Id*. at 836-37 (citing secondary authority). *Farmer* clarified that only the latter suffices: "[A] prison official may be held liable . . . only if he knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures." *Id*. at 847. It is not enough that a defendant ***should have known*** that an inmate faced a substantial risk of harm.

Farmer therefore instructs that conduct constituting deliberate indifference must fall into the reckless range, or that it is "more than mere negligence." And, to ensure it satisfies criminal, rather than civil recklessness, the defendant must have had actual subjective knowledge of the risk and disregarded it. In other words, there are three elements: (1) subjective knowledge of a risk of serious harm; (2) disregard of that risk; (3) by conduct that is more than mere negligence. These elements, taken ***verbatim*** from *Farmer* ***to implement the criminal recklessness standard***, were the ones articulated in *McElligott* and used below here.

The Deputies focus on the third prong of the deliberate indifference test in isolation. They suggest the "more than mere negligence" phrasing impermissibly lumps civil recklessness (also sometimes referred to as "gross negligence," *see Farmer*, 511 U.S. at 836 n.4 (citing secondary authority)) together with deliberate indifference. But that conclusion fails when one considers the very first element of the integrated, three-element test. That knowledge element ensures the defendant has ***actual subjective knowledge*** of the risk of serious harm, so the test ***as a whole*** ensures that ***only*** criminal recklessness is deemed deliberate indifference, thereby alleviating the Deputies' concerns.

The fact that the proper analysis is unaffected by which formulation of the test this Court uses is apparent from the Deputies' approving reliance on *Swain v. Junior*, 961 F.3d 1276 (11th Cir. 2020). *See, e.g.*, Br.25, 27. According to the Deputies, "[a]s explained by the Court in . . . *Swain*, the correct standard to judge the culpability of the defendants' conduct on a §1983 deliberate indifference claim is higher than the 'mere negligence' standard announced in some Eleventh Circuit cases and applied by the district court here." Br.25. But even a cursory reading of *Swain* reveals that ***the case adopted the "more than mere negligence" formulation***. *See Swain*, 961 F.3d at 1285. Astonishingly, the Deputies criticize the district court here for adopting the wording from a case the Deputies themselves cite to argue that "more than mere negligence" reflects an incorrect standard.

Moreover, several panels of this Court adopting the "more than gross negligence" standard (including most of the recent cases) have taken pains to point out that "[t]hese competing articulations" of "gross" vs. "mere" negligence may very well "represent a distinction without a difference" because both formulations of the test point back to *Farmer* and converge on the culpability standard. *E.g.*, *Hoffer v. Secretary*, 973 F.3d 1263, 1270 n.2 (11th Cir. 2020); *Patel*, 969 F.3d at 1188 n.10; *Riddick v. United States*, 2020 WL 6156593, at *4 n.6 (11th Cir. Oct. 21, 2020). By focusing on the language used in the third element rather than considering the test as a whole, the Deputies quibble over wording that lacks any legal substance.

2. If a choice were necessary, the "more than mere negligence" formulation would be required.

There is no substantive difference between the competing phrases. But if a panel were forced to choose, it would need to choose the "more than mere negligence" formulation, for two reasons.

First, if the different formulations represented different legal standards – which they do not – that would constitute an intra-circuit split. However, "[w]hen faced with an intra-circuit split," this Circuit applies "the 'earliest case' rule, meaning 'when circuit authority is in conflict, a panel should look to the line of authority containing the earliest case.'" *Morrison v. Amway*, 323 F.3d 920, 929 (11th Cir. 2003) (quoting *Walker v. Mortham*, 158 F.3d 1177, 1188 (11th Cir. 1998)). *McElligott* was this Court's first case to use the three-element test for

deliberate indifference, so subsequent panels must use the "more than mere negligence" formulation. *See Melton v. Abston*, 841 F.3d 1207, 1223 n.2 (11th Cir. 2016). A panel of this Court in *Townsend* suggested that *Cottrell v. Caldwell*, 85 F.3d 1480, 1490 (11th Cir. 1996), a case predating *McElligott*, stands for the proposition that, after *Farmer*, "a claim of deliberate indifference requires proof of more than gross negligence." 601 F.3d at 1158. That is true, but not relevant. Everyone, including the *McElligott* panel, understood, after *Farmer*, that deliberate indifference requires proof of criminal recklessness. The question is the best formulation of the third element, ***once the first element has already required proof of subjective knowledge***. *McElligott* is binding as the first panel to establish the three-part test. The fact the Deputies thought it necessary to file a Petition for Initial Hearing En Banc (filed November 25, 2020) confirms this.

Second, as another panel has observed, "the 'more than mere negligence' standard in *McElligott* is more consistent with *Farmer* than the 'more than gross negligence' standard in *Townsend*." *Melton*, 841 F.3d at 1223 n.2. Indeed, the phrase "more than mere negligence" appears in *Farmer*, describing the holding of *Estelle*. *See Farmer*, 511 U.S. at 835 ("While *Estelle* establishes that deliberate indifference entails something ***more than mere negligence***, the cases are also clear that it is satisfied by something less than acts or omissions for the very purpose of causing harm or with knowledge that harm will result.") (emphasis added). That is

expressly why the *McElligott* Court adopted the phrase. *See* 182 F.3d at 1255 ("in addition to the subjective awareness of the relevant risk, *Estelle* requires ***that plaintiff show more than mere negligence***.") (emphasis added).

By contrast, *Farmer* disapproved of the term "gross negligence," referring to it as "nebulous." *See* 511 U.S. at 836 n.4 ("Between the poles lies 'gross negligence' too, but ***the term is a 'nebulous' one***, in practice typically meaning little different from recklessness as generally understood in the civil law.") (emphasis added). Given that (1) both formulations (construed within the entirety of all three necessary elements) accurately capture *Farmer's* criminal recklessness standard, (2) *Farmer* included language that deliberate indifference "entails something more than mere negligence," and (3) *Farmer* did not think the term "gross negligence" had sufficient precision or rigor, it is clear the *Farmer* Court mandated the "more than mere negligence" wording.

3. The difference between the alternate formulations is irrelevant here, because the question is not presented.

The Deputies spill much ink on wording, but very little explaining why the standard matters here. That is because an examination of the Deputies' arguments reveals that it doesn't matter which formulation was used because their conduct was sufficiently egregious to satisfy either.

The Deputies' entire argument is predicated on the notion – flying in the face of the record below – that their actions cannot be construed as anything beyond

negligence. *See, e.g.*, Br.28 n.10 ("The district court's order denying summary judgment constitutionalizes what is really common law negligence because the facts are bad."). They are wrong, of course. *See infra* at 34-52. But for present purposes the critical point is that the district court's formulation requires "***more*** than mere negligence." [ECF85, p.16 (emphasis added)]. If the Deputies were correct that their conduct was "negligence, not deliberate indifference," (Br.39), then their quarrel is with the district court's application of law to fact, ***not*** the legal standard.

The district court determined (in the context of adjudicating the motion on the state-law claims) that a jury could find the Deputies' conduct "willful" and "wanton," (ECF85, pp.16-17), a standard of culpability far higher than the Deputies' sought-after "more than gross negligence" standard. In other words, regardless of wording, the court held unambiguously that a jury could reasonably find that the Deputies' conduct ***was*** considerably "more than gross negligence," which is all that ultimately matters.

At bottom, the Deputies' argument is actually a request for an advisory opinion on a legal question not fairly presented, for which this Court lacks jurisdiction. *See, e.g.*, *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975).

4. The court correctly applied the objective standard.

Finally, the Deputies assert that "[t]he district court failed to even cite in the summary judgment order, much less apply, the correct legal standard for the

objective finding necessary to sustain a claim of deliberate indifference to a suicide risk." Br.38. Not so.

The Deputies correctly report that, "[t]o show the objective prong, Plaintiff must show that ***there is an objectively serious medical need***." Br.24 (emphasis added). The district court expressly found that, "[b]y virtue of being on suicide watch, Fran posed a risk of self-harm and ***thus had a serious medical need***." [ECF85, pp.3-4 (emphasis added) (citing record evidence)]. If the district court didn't belabor the point, that is because the Deputies conceded it (ECF60-2, pp.91-93; 60-1, pp.81-82), as did the Jail (ECF60-4, pp.39-40). The Deputies did not contest the objective prong at summary judgment. It is disingenuous for the Deputies to criticize the district court for not stressing a conceded factual point not advanced in their motion.

B. The District Court Correctly Determined a Reasonable Jury Could Find the Deputies Deliberately Indifferent

1. Standard of Review

Under ordinary circumstances reviewing a ***final*** judgment, the ***grant*** of summary judgment is reviewed *de novo*. *Kernel Records Oy v. Mosley*, 694 F.3d 1294, 1300 (11th Cir. 2012). But where, as here, a defendant takes an ***interlocutory*** appeal from a ***denial*** of summary judgment on qualified immunity, there are jurisdictional constraints on review. Thus, the Court "will not disturb a factual finding by the district court if there is ***any record evidence*** to support that finding."

Hall v. Flournoy, 975 F.3d 1269, 1271 (11th Cir. 2020) (emphasis added). The *Hall* Court used the phrase "factual finding" to refer to the inferences the court found permissible when, as here, summary judgment is sought on qualified immunity.

2. The district court's factual assessment is overwhelmingly supported by record evidence the Deputies have not disputed.

After his review of the extensive record evidence, Judge Vinson denied the Deputies' motion, providing a detailed summary of the relevant facts. [ECF85, pp.3-15]. That summary is replete with specific references to the record (primarily Deputies' deposition testimony) directly supporting the court's inferences. Among many, many other things, the court cited Gaddis's admissions to acting "deliberately" and "knowingly" and disregarding Fran's serious medical needs (*id*. at 13), Bauman admitting that, had she checked Fran that morning as required, she would have seen him attempting to hang himself a few times, which is the entire point of monitoring (*id*.), Bauman admitting to willfully neglecting her duties and being disciplined for that (*id*. at 14), and a reasonable jury could find the Deputies acted with willful and wanton disregard for Fran's safety and well-being. *Id*. at 17.

To counter this massively detailed and specific analysis of the record, the Deputies cite . . . nothing. In fact, from reading the Deputies' Brief, one would not know that the district court's factual assessment existed. Instead, the Deputies simply ignore it, characterizing the court's legal holding based on their own version of the facts, in which the Deputies' most self-serving statements are credited and

nothing else exists. But, as the *Patel* Court explained, "when it comes to arguing the merits," a summary-judgment movant "should not – may not – rely on his own factual story. Rather, he should – must – accept his opponent's story and convince us that he is nonetheless entitled to prevail as a matter of law." 969 F.3d at 1179 n.1.

The Deputies have made no pretense of complying with *Patel's* admonition. They do not argue they are entitled to judgment based on the district court's factual assessment. Making matters worse, they don't even try to argue that the court's factual summary is wrong; they merely attempt to substitute their own facts. The Deputies' failure to acknowledge, let alone dispute, the district court's factual assessment compels affirmance.

3. The Deputies' version of the facts directly contradicts the record.

Neither this Court nor Appellees should have to indulge in this last step – factual confirmation of the district court. But, in the Deputies' alternate universe, in which the district court never initially interpreted the facts, they believe that the facts of this case, when construed most favorably to the plaintiff, show that "(1) an inmate is a known suicide risk and (2) the officers assigned to watch him shirk their duties." Br.28 n.10. That is akin to characterizing the Biblical Massacre of the Innocents as (1) children being under the protection of the King and (2) the King engaging in overenthusiastic discipline. *Cf.* KJV Bible, Matthew 2:16.

The Deputies' factual claims share a common flaw, anticipated by the Court in *Farmer*. Consider a hypothetical situation in which an inmate is bleeding to death from a severed artery, and the jailor refuses to render any first aid because of a mistaken but genuine belief that the body replaces lost blood, so it isn't possible for the inmate to bleed to death. Because the standard for deliberate indifference requires subjective knowledge of the risk, such a jailor could prevail at trial if capable of convincing the jury that his beliefs were sincere. But, even if the jailor's testimony of his belief was undisputed, he would nevertheless ***not*** be entitled to summary judgment because a reasonable jury could conclude ***from the obviousness of the risk alone*** that the jailor ***did*** know. As the *Farmer* Court put it, "Whether a prison official had the requisite knowledge of a substantial risk is a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence . . . , and ***a factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious***." 511 U.S. at 842 (emphasis added); *see also DeVeloz v. Miami-Dade County*, 756 Fed. Appx. 869, 878 (11th Cir. 2018). Here, there is record evidence refuting each of the Deputies' unreasonable contentions. But a jury could reasonably disregard them based on their implausibility alone.[2]

[2] Citations for facts referenced in the discussion below can be found *supra* in the Statement of the Case.

a. A jury could conclude the Deputies knew Fran's continuous screaming for an hour indicated distress.

The Deputies testify that Fran was screaming continuously between 8:25 and 9:18. Although hourlong screams from a known-suicidal man suggest something meriting investigation, the Deputies disagreed, and in fact claim their passive listening to Fran's agony constituted several close watches. They remained seated, never walking mere steps (to see the ligature that Fran tied while screaming). As their defense, they now claim they had no idea that a suicidal man screaming for an hour might be a danger sign requiring investigation. *See, e.g.*, Br.37, 44 ("the record is undisputed but that they frequently heard him yell and did not believe him to be in distress").

A reasonable jury could infer the Deputies understood Fran's hourlong screaming ***did*** indicate distress, for many reasons. First, as noted above, a jury could make the inference from the obviousness of the proposition alone. Second, the Jail expected that, when a suicidal inmate is screaming, deputies will investigate the cause, because the screams of suicidal inmates are more likely to indicate distress than those of regular inmates. Third, both Deputies were subjectively aware that Fran had very recently been screaming threats to kill himself, either because they read the incident report (Bauman) or had the gist of the report described to them (both Deputies). Fourth, although the spoliation of the audio that day (a fact that alone permits the inference of distress) prevents the jury from hearing Fran's

screaming for themselves, viewing Fran's frantic pacing and manic demeanor on the videotape while he is screaming permits the inference that his screams were obviously distressed and suicidal. And finally, from the facts that the Deputies admitted that they had no idea what Fran was saying, that he may very well have been threatening to kill himself, and that they failed to take either of the easy actions that could have resolved the matter (walking the few steps to check on Fran or summoning a nearby translator), a jury could conclude that the Deputies remained willfully blind (or deaf) to the nature of Fran's screaming.

b. A reasonable jury could conclude neither of the Deputies adequately checked on Fran for the two-and-a-half hours between 8:11 and 10:45.

It is undisputed that, over the course of the morning of April 7, there were only two occasions on which either Deputy physically walked the few feet over to Fran's cell to confirm that he was safe, and the latest of those was at 8:11. A jury could reasonably conclude that the Deputies simply ignored Fran for the two-and-a-half hours preceding his death. The Deputies have a twofold rebuttal: they had no idea it was necessary to physically walk to the cell for a valid check, and Bauman conducted a valid check on Fran at 10:25. They make no effort to comply with the governing standard of review, that there isn't "any record evidence" to support it. But even evaluated *de novo*, a reasonable jury would swiftly reject both contentions.

First, both Deputies understood that physical checks were necessary. As the internal affairs report concluded, "the curtain to the window of the cell was drawn (preventing anyone from seeing in or out of the window) and there was some type of covering over the bottom portion of the window adjacent to the door. This prevented observation of the entire cell from all vantages points in ACR with the exception of very close proximity to the sole uncovered window." [ECF72-3, pp.10-11]. Either of the Deputies could have removed those obstructions, but they chose not to, making them deliberately indifferent to goings-on within Fran's cell unless they walked up to the door.

Moreover, both Deputies admitted to internal affairs that a valid close watch ***required*** a physical check. Bauman "agreed that if a deputy had completed the Close Watch form indicating a check had been performed, then it is a reasonable inference that the deputy had physically walked to that cell and looked inside to ensure the inmate's safety." *Id*. at 16. And, indeed, Bauman's only two entries on the close watch form were the two times she physically checked on Fran. "Deputy Gaddis explained to me that these close watch checks require the deputy to physically observe the inmate." *Id*. at 17. Gaddis certified 13 close watches on the form, but he also confessed to fraudulently completing it ("pencil-whipping"). Both the internal affairs investigator and Gaddis's supervisor determined, from the videotape, that Gaddis ***never*** made a valid close watch. The Deputies' failure to make a

physical check over two-and-a-half hours, during which Fran repeatedly tried to kill himself, constituted deliberate indifference.

Second, the Deputies attempt to fabricate a corner-of-Bauman's-eye glimpse of Fran at 10:25. *See* Br.23 ("Bauman testified that at approximately 10:25 a.m. she saw Escano-Reyes just before the suicide and the video is consistent with her testimony."). This is a classic example of asserting self-serving testimony and ignoring everything else. It is undisputed that Bauman didn't physically check on Fran then, so, as demonstrated immediately above, Bauman knew that wasn't an adequate check. But a reasonable jury could also conclude that even the glimpse never happened. As was pointed out above (at 19-20), (i) Bauman admitted during the internal affairs deposition that ***she hadn't performed any checks after 10*** but presumed Gaddis must have done so, (ii) she admitted at her deposition that she had no independent recollection of seeing Fran between 10:15 and 10:30, and (iii) the internal affairs investigation definitively found that no checks occurred after 10. Finally, because the alleged 10:25 check did not appear on the close watch form, this Court's opinion in *Cagle* ***precludes*** consideration of that check for summary judgment purposes. 334 F.3d at 984 & n.6.

c. A reasonable jury could conclude the Deputies understood neither ACR-1 nor suicide smocks magically negate the possibility of suicide.

In a final effort to forestall liability, the Deputies claim that they genuinely believed they were justified in abandoning Fran because, safely ensconced within ACR-1 in a suicide smock, self-harm was impossible. *See, e.g.*, Br.39 (although the Deputies knew Fran was on suicide watch, they were "operating under the belief that he was housed in a cell and with a suicide prevention smock that would remove the risk"). Again, a reasonable jury could demur.

First, a jury could reject this contention by inference from its sheer objective unreasonableness. Suicide watch is ***the most serious risk*** to inmates; it indicates that the inmate has a serious medical need requiring continuous supervision. The continuous-observation protocol isn't limited to suicidal inmates housed on clifftops while juggling chainsaws; despite the fact that inmates on suicide watch are dressed in suicide smocks and housed in cells believed to be safe, ***all*** inmates deemed suicidal nevertheless ***require*** continuous monitoring; the medical staff, appreciating the danger, requires it. [ECF60-1, p.49; 60-2, p.188].

Second, the Deputies try to slice their purported lack of subjective awareness of the risk far too thin. This was not a game of Clue, where the Deputies were required to predict that the harm would be by Fran, in the ACR-1, specifically with the suicide smock. Otherwise, all officials could disavow subjective awareness in

this way ("I knew it was Colonel Mustard in the Conservatory, but only if with the lead pipe, not the candlestick"). There are any number of ways that a suicidal inmate can inflict self-harm. The Deputies were aware from Fran's prior incident reports that he had engaged in self-harm by punching and mule-kicking the door/walls. Even if they believed suicide smocks were harmless, Fran could nevertheless very easily have been bashing his head against his cell, sticking his fingers down his throat (actually shown on the videotape), or harming himself in myriad other ways. *See Farmer*, 511 U.S. at 843 ("Nor may a prison official escape liability for deliberate indifference by showing that, while he was aware of an obvious, substantial risk to inmate safety, he did not know that the complainant was especially likely to be assaulted ***by the specific prisoner who eventually committed the assault***. The question . . . is whether prison officials, acting with deliberate indifference, exposed a prisoner to a sufficiently substantial 'risk of serious damage to his future health,' . . . and ***it does not matter whether the risk comes from a single source or multiple sources***.") (emphasis added). Thus, the Supreme Court itself has foreclosed the claim, "I was guarding against Professor Plum, not Colonel Mustard." As the Jail recognized, and as a jury could infer the Deputies knew, if an inmate on suicide watch goes completely ignored for a long period of time, self-harm is highly likely. [ECF60-4, pp.176-77].

Third, and finally, the Deputies' own testimony precludes the conclusion that "Gaddis and Bauman did not believe that Escano-Reyes even could commit suicide." Br.33. At deposition, Gaddis was asked what he would have done had he been able to translate Fran's screaming and realized he was actively suicidal. Note the question was not what he would have done in retrospect, knowing what he knows now; it was what he would have done ***at that point in time***. According to Gaddis, "I would have called my supervisor, which was Sgt. McPhail. I would have escorted him into the change-out room, put him in a paper smock, and he may have been put in a restraint chair." [ECF60-2, p.54]. That squarely negates the Deputies' current claim. If Fran were completely safe in ACR-1, there would be no need to put him in a restraint chair. If Fran were completely safe in the heavy suicide smock, there would be no need for the lighter paper smock, which could not have borne his weight. Gaddis knew there was a suicide-proof posture, and it was not ACR-1.

Bauman also testified that Fran was at risk specifically despite being in the smock, in ACR-1:

"Q. Okay. Is there any doubt about that in your mind?

A. That he had the potential risk for suicide?

Q. Yeah.

A. No, there's no doubt.

Q. Okay. And that was true as of that entire morning that you were monitoring him; correct?

A. Correct."

[ECF60-1, p.82; *see also id*. at 72 ("He obviously had the potential [to kill himself]. He was on suicide watch."); *id*. at 75-76].

d. The Deputies have conceded their deliberate indifference to Fran's serious medical needs.

The Deputies' factual challenges seek to minimize their subjective awareness of the risks to Fran. But they never address the central point – conducting checks on suicide-watch inmates constituted ***required medical care***. This Court's precedent is clear: the subjective awareness standard can be met merely via knowledge that medical care was necessary. Thus, "knowledge of the need for medical care and intentional refusal to provide that care constitute[s] deliberate indifference." *Harris v. Coweta Cnty.*, 21 F.3d 388, 393 (11th Cir. 1994). Both Deputies ***knew*** that Jail medical authorities required continuous supervision (consisting of, at minimum, periodic 15-minute physical checks). By abandoning Fran for two-and-a-half hours, then, both Deputies ***intentionally refused*** to provide the ***medically required care***, which is definitionally deliberate indifference.

Indeed, both Deputies admitted disregarding the medical requirements. Gaddis testified:

"Q. ***Knowing that experts had deemed Mr. Escano-Reyes a suicide risk for the entirety of your shift that morning***, you nevertheless disregarded their directive – ***you nevertheless disregarded their instructions on how to provide medical attention to him***; is that fair?

A. That's fair."

[ECF60-2, p.188 (emphasis added); *see also id*. at 193 ("Q. He had a medical need that he be on suicide watch that you knew of at the time you disregarded, is that correct? A. Yes, sir.").

Bauman agreed:

"Q. Medical professionals require fifteen-minute interval checks at a minimum because if the checks aren't done people could die, right?

A. Right.

Q. And checks were required by the medical professionals; correct?

A. Right.

Q. And you didn't follow those protocols that the medical professionals had put in place; correct?

A. The two times I did it here [*i.e.*, at 7:57 and 8:11] it was.

Q. Okay. But were you not responsible for the entirety of that sheet?

A. It's both of our responsibility, yes."

[ECF60-1, p.123].

Under this Court's precedent, that testimony represents a concession of deliberate indifference, ending the summary judgment inquiry. The Deputies can swear all day long they actually believed Fran was magically immune from suicide, but they knew of the medical directives to monitor him, and they intentionally disregarded them.

4. The Deputies' own caselaw supports the denial of summary judgment, as does this Court's recent decision in *Patel*.

The Deputies rely on three cases to claim they lacked the necessary appreciation of the risk to Fran: *Goodman v. Kimbrough*, 718 F.3d 1325 (11th Cir. 2013), *Gish v. Thomas*, 516 F.3d 952 (11th Cir. 2008), and *Cagle*, *supra*. But those cases support denial of summary judgment. And the Deputies ignore this Court's recent *Patel* decision compelling the same conclusion.

a. Goodman

Goodman does not help the Deputies because it concerns circumstances where a defendant lacked the requisite knowledge of risk. 718 F.3d at 1329-31. There may have been negligence on the part of the *Goodman* jailors, but no evidence supported a finding that they "harbored a subjective awareness that Goodman was in serious danger while in his cell." *Id*. at 1332. In other words, while the jailors behaved negligently, nothing permitted a finding those jailors ***actually knew*** of the inmate's danger. Here, the opposite is true and even recognized by the Deputies. *See* Br.32 ("[a]t first blush, *Goodman* would appear to be factually distinguishable from the

instant case in that the guards who failed to conduct the policy-required head counts and cell checks in that case did not know of a risk of serious harm to the plaintiff from other inmates, whereas Gaddis and Bauman knew that Escano-Reyes was on suicide watch").

Thus, the Deputies fruitlessly claim, under their "ACR-1 was a magic suicide-free zone" theory (addressed *supra* at 42-45) that "Gaddis and Bauman did not believe that Escano-Reyes even could commit suicide." Br.33. As Bauman admitted, ***all*** persons deemed suicidal require continuous monitoring. [ECF60-1, p.49]. The Deputies were both aware that the medical authorities at the Jail had specifically designated Fran a suicide risk and that their duties included providing medical help to Fran through continuous monitoring. They both willfully disregarded those medical orders. They ***were*** subjectively aware of the risk; *Goodman* does not help them.

b. Gish

In contrast to *Goodman*, *Gish* is a level-of-disregard case, but it is still unavailing. *Gish* could apply only by construing disputed facts in the Deputies' favor on summary judgment. Even then, they would fare no better because of ineluctable record evidence. The *Gish* defendant affirmatively believed a known-suicidal arrestee lacked access to the front of a squad car (containing a loaded firearm) because he (incorrectly) thought it was locked; it wasn't. Absent

"aware[ness]" of what "might have been," this was simply a horrible mistake warranting qualified immunity on a "fact intensive issue." 516 F.3d at 953, 955. In other words, it was negligence – but not more – for the *Gish* defendant to believe a window was locked.

By contrast, this record clearly suggests the Deputies knew what might have been. Gaddis knew Fran might have been hurting himself while shouting; Bauman knew Fran had in fact done so before. They cannot wedge their circumstances within the "fact intensive" confines of *Gish* unless one (a) is forced to accept that their self-reported beliefs are true, (b) presumes that ACR-1 is a magic suicide-free zone, (c) casts aside the mountain of contrary circumstantial evidence, and (d) casts aside their direct admissions. The Deputies' duties that day ***specifically consisted of medically-required monitoring of a suicidal inmate precisely because of the risks inherent in failing to do so***. Thus, *Gish* is a poor comparator.

c. Cagle

Although *Cagle* is distinguishable, it nevertheless makes the fatal pronouncement that one can't do ***nothing*** to monitor a suicidal inmate and escape 1983 liability. That is what the facts here indicate and why, fundamentally, *Cagle* finds qualified immunity; that deputy in fact ***did engage in adequate monitoring***. 334 F.3d at 983-85 (observing that the defendant had been able to observe the decedent every fifteen minutes ***and in fact did so***). *Cagle* held merely that a failure

to perform some checks for an inmate stripped of implements to assist suicide did not, in and of itself, give rise to constitutional liability. In contrast, these Deputies ***did*** do nothing, and they had only Fran to monitor the entire morning of their shift.

The Deputies cite *Cagle* presumably because they like the fact that Jailer Cole, who received qualified immunity, "was aware that Butler's belt, his shoelaces and the contents of his pockets had been confiscated. Jailer Cole was also aware that Butler's cell had been stripped of implements that might assist suicide." *Id*. at 989. "While these facts indicated Butler was a suicide risk, they also decreased the risk. These acts show a lack of deliberate indifference on the part of jail personnel and decreased the likelihood that Butler would commit suicide." *Id*. Analogizing to Fran's confinement in ACR-1, the Deputies suggest that they, too, are entitled to judgment because they were merely negligent. *See* Br.35-37.

But *Cagle* strongly supports liability here, because of a portion of the opinion the Deputies do not address. The Court did not hold that jailors can safely do nothing after nakedly supposing that harm is impossible; ***they must also conduct adequate monitoring***. Although Jailer Cole missed one hourly check and went an hour and forty-five minutes between physical checks, he was also monitoring the inmate via closed circuit TV. Thus, critical to the Court's ruling in *Cagle* was that "***Jailer Cole did not ignore Butler.*** He was instructed to watch Butler, and he did. The record reflects that Jailer Cole observed Butler through the TV monitor ***at least every 15***

minutes. Closed circuit TV monitoring reflects concern for a prisoner's welfare and a lack of deliberate indifference." 334 F.3d at 989-90 (emphasis added). In order to obtain summary judgment, Cole needed to point to evidence that he had, in fact, adequately monitored his suicidal prisoner and was therefore not deliberately indifferent. Here the Deputies ***did*** ignore Fran. They ignored him completely over the critical ninety-minute period from 9:15-10:45, in which Fran tried to kill himself nine times before succeeding. Any minimal effort by either Deputy to obey the medical orders and walk the few steps over to ACR-1 would have saved Fran's life. But they failed to do so. On this record, a jury could reasonably conclude that the Deputies ***were*** deliberately indifferent to Fran's serious medical needs; there was no error in denying summary judgment.

d. Patel

Unsurprisingly, the Deputies fail to cite *Patel*. There, Deputy Smith was transporting Patel in an unventilated transport van on an 85-degree Georgia day. 969 F.3d at 1179. Smith left Patel alone in the back of the van for an hour. *Id*. He returned to find Patel unconscious and hyperventilating on the floor. *Id*. Patel begged for water, and Smith agreed. *Id*. Smith reneged, and Patel once again passed out. *Id*. at 1180. Back at the jail, Smith ignored Patel despite signs of distress, until Patel asked for an ambulance. *Id*. At the hospital, Patel was diagnosed with heat exhaustion, heat syncope, and a panic attack. *Id*.

Patel sued under excessive force and deliberate indifference theories, and the district court granted summary judgment. On appeal, this Court affirmed the judgment on excessive force but reversed on deliberate indifference. Although Patel had never been formally diagnosed with a serious medical condition, this Court determined that a jury could infer from Patel's symptoms that his condition was objectively serious. *Id*. at 1189. As to the subjective prong, the Court found that Smith knowing about Patel's condition "yet provid[ing] no medical attention suffices to demonstrate that Smith was deliberately indifferent." *Id*. at 1190. Here, of course, the Deputies did not need to infer from Fran's screaming, delusional and self-harming behavior his serious medical need because they had been informed of that need. Their decision to ignore Fran, then, is much more culpable than Deputy Smith, who was required to stand trial for deliberate indifference.

II. CARE OF SUICIDAL INMATES WAS CLEARLY ESTABLISHED

A. The Deputies' Position is Waived

The Deputies' ten-page argument is entirely different from their negligible argument below. Their Motion argued, in a single sentence, only that "there was no 'clearly established law' which required Bauman and Gaddis to visually inspect the [*sic*] Escano-Reyes every 15 minutes." [ECF66, p.19]. They cited only a single adopted magistrate report. *Id*. Their Summary Judgment Reply says nothing about clear establishment, addressing *Snow* but only for "Known Risk" under a heading

for that argument. [ECF77, p.4]. Now, their Brief argues everything ***but*** the one sentence/case from Summary Judgment. It is waived: "an appellate court will not consider a legal issue ***or theory*** raised for the first time on appeal." *Formby v. Farmers,* 904 F.2d 627, 634 (11th Cir. 1990). Neither the Deputies' appellate theories, nor their cases, were urged upon the district court in the first instance.

B. The Court Correctly Invoked Obvious Clarity and Prior Precedent

1. Obvious Clarity

For obvious clarity, in addition to waiver, the Deputies' Brief has no opposing ***argument*** now. "[A]n appellant abandons a claim when he either makes only passing references to it or raises it in a perfunctory manner ***without supporting arguments*** and authority." *Sapuppo v. Allstate*, 739 F.3d 678, 681 (11th Cir. 2014). The Deputies' Brief reveals no actual ***argument*** on obvious clarity. Instead, they cite boilerplate that obvious clarity is a "high" standard from *Preister*, *Post* and *Corbitt*. Br.45. The closest the Deputies come to an argument is claiming, "[i]t is not that the conduct is simply 'wrong' as the district court appears to have concluded here." *Id*. If that is an "argument," the Order facially refutes it. The Order is ***not*** a mere finding of "wrongfulness"; it is a holding of obvious clarity with authority. [ECF85, p.17]. As the Supreme Court recently emphasized in *Taylor v. Riojas*, 2020 WL 6385693, *1 (Nov. 2, 2020), obvious clarity requires that "no reasonable correctional officer could have concluded that . . . it was constitutionally

permissible" to engage in the challenged conduct. The court correctly determined that no reasonable officer could believe that ignoring a screaming, known-suicidal inmate for hours was consistent with the constitution, and the Deputies have no argument otherwise. Any argument raised in the Deputies' Reply is plainly waived. *See, e.g.*, *Walter v. Salinas*, 650 F.3d 1402, 1413 n.7 (11th Cir. 2011).

2. Precedent

The court also held that "as of 2005 it was clearly established that a jail official who has subjective knowledge of a serious risk of suicide and takes no action to prevent it violates the constitution." [ECF85, pp.16-17 (*citing Snow v. City of Citronelle*, 420 F.3d 1262 (11th Cir. 2005))]. *Snow* is directly on point ***given the court's understanding of the submissible facts*** – jailors aware of a suicide risk, medically charged with monitoring, who instead socialize and surf the internet. The Deputies never dispute ***that***. Instead, they make only ***factual*** arguments, recycling their jurisdictionally-barred claims that: i) they did not think Fran could commit suicide; ii) they heard him yell but perceived no distress; and iii) monitoring did not require physical checks. This factual argument does not address clear establishment; if the Deputies were merely negligent, that could not ever constitute deliberate indifference, so there would ***never*** be precedent "clearly establishing" it. *Snow* and *Cagle* establish the "unlawfulness of the conduct," because they are on all fours,

even though "exact factual identity with a previously decided case is not required." *Melton*, 841 F.3d at 1221.

The Deputies claim *Gish* and *Cagle* "stand for the opposite proposition." Br.44. Above, at 48-49, Rogers showed that the deputy in *Gish*, who made a one-time mistake in thinking his firearm was secured, is nothing like the Deputies, who were specifically charged by a medical staff with monitoring a suicidal inmate but "willfully disregarded" that charge to socialize and surf the internet. *Cagle* establishes that jailors must also conduct adequate monitoring. *See supra* at 49-51.

C. The District Court Did Not Incorrectly Focus on Institutional Policy and Knowledge

The Deputies claim "[t]he district court at least in part impermissibly judged the constitutionality of the actions of Gaddis and Bauman on whether they adhered to jail policy requiring 15-minute checks, or whether they adhered to model jail standards which require constant observation." Br.46. Not so. Two of their three cites come in the "Background" section, and the court's next section "III. Discussion" has a separate subheading "A. The Deputy Defendants' Motion." ***That*** is where the court evaluates qualified immunity for the Deputies. The Background discussed Jail policy because it is directly relevant to ***other*** claims, including a *Monell* claim directed to Jail practices. *See, e.g.*, ECF85, p.18 ("Sheriff Johnson's Motion"). The court reviewed deposition testimony for each Deputy to show they

knew their duty, and willfully disregarded it. The ***other*** parts of the Order reflecting ***Jail*** knowledge and practices are necessary to address claims ***against the Jail***.

D. There is no Doctrinal Confusion

The Deputies recycle their "mere" versus "gross" negligence argument, claiming it destroys "fair warning." Br.49-50. First, there is no doctrinal difference, *see supra* at 26-30. Second, if there were confusion, it has nothing to do with the Order's rationales for clear establishment. The duty ***to do something*** constitutionally adequate to care for suicidal inmates is both obvious and precedential in *Snow* and *Cagle*. The Order deems the conduct culpable far beyond any formulation of the test. Nor could anyone believe that legal semantics undercut jailors' obligations to care for known-suicidal inmates.

CONCLUSION

This Court should affirm.

Dated: January 5, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this document complies with the word limit of FRAP because, excluding the parts of the document exempted by FRAP 32(f), this document contains 12,998 words. This document complies with the typeface requirements of FRAP 32(a)(5) and the type-style requirements of FRAP 32(a)(6) because it is composed in a proportional Times New Roman 14-point font.

/s/ Erik W. Scharf
Attorney for Appellee Jessica Rogers
Dated: January 5, 2021

CERTIFICATE OF SERVICE

I hereby certify that on January 5, 2021, I electronically filed the foregoing Appellee's Response Brief with the Clerk of the Court using the CM/ECF system which will send a notice of electronic filing to all counsel of record.

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