No. _____

In The
Supreme Court of the United States

JAMES SAYLOR,

Petitioner,

v.

RANDY KOHL, M.D.; DENNIS BAKEWELL; ROBERT HOUSTON; CAMERON WHITE, Ph.D.; MARK WEILAGE, Ph.D.; FRED BRITTEN; and KARI PEREZ, Ph.D.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

To the Eighth Circuit, Respondents' issue was whether the district court erred in denying their summary judgment motion on the basis of qualified immunity. They asserted immunity due to the absence of any violation of a clearly established right. That issue has not changed; it has been compounded. The district court denied Respondents' motion on the facts. It found that the facts asserted as the basis for qualified immunity were disputed. Respondents' appeal was interlocutory, which, when a motion is decided on the facts, customarily makes the scope of review relatively narrow. Questions of the law, *per se,* were not involved. Review, according to the Court's decisions, is two-fold: (a) whether the facts determined by the district court are in "blatant contradiction to the record"; and, (b) whether the district court provided a reasoned analysis of the qualified immunity claim. The Eighth Circuit, nonetheless, disregarded the district court's fact findings, formulated *and resolved* its own findings of fact, and, in so doing, disregarded the maxim that the facts are to be viewed in the light most favorable to the non-moving party. The question implicates the requirements of the Seventh Amendment, the Court's decisions in *Scott v. Harris* and *Tolan v. Cotton,* and sets the Eighth Circuit apart from most, if not all, of the other Circuit Courts.

QUESTIONS PRESENTED – Continued

Accordingly, the question presented is whether courts deciding interlocutory appeals involving qualified immunity should conduct *ad hoc* and de novo review of the underlying facts, and, if they so elect, resolve any controverted facts, rather than deferring to the fact findings of the trial court.

A further question presented (perhaps subsidiary, perhaps not) is whether courts deciding such appeals may enter a complete dismissal of parties when other motions involving such parties, material to summary judgment, remain for decision in the district court.

LIST OF PARTIES

James Saylor, Petitioner, at all times material, has been an inmate of the Nebraska Department of Correctional Services (NDCS).

Dennis Bakewell, Robert Houston, and Fred Britten, at all times material, were employees of the NDCS.

Randy Kohl, Cameron White, Mark Weilage, and Kari Perez, at all times material, were medical employees of the NDCS.

Natalie Baker, Mohammad Kamal, and Correct Care Solutions, LLC, also affiliated with the NDCS, did not appeal the district court order, and have only limited, if any, interest in the outcome here.

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PETITION FOR A WRIT OF CERTIORARI

James Saylor respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The January 29, 2016, opinion of the Court of Appeals is reported at 812 F.3d 637 (8th Cir. 2016), and reprinted at Appendix 20. On March 4, 2016, the Court of Appeals revised its opinion, and that revised opinion is reprinted at Appendix 1. The opinion of the district court issued on December 22, 2014, and is reprinted at Appendix 41. Although a revised opinion was issued the same date, the Court of Appeals denied panel rehearing on March 4, 2016, and en banc rehearing on March 28, 2016, which Orders are reprinted at Appendices 74, and 75, respectively.

JURISDICTION

The Court of Appeals denied rehearing en banc on March 28, 2016. App. 75. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Seventh Amendment to the United States Constitution provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

42 U.S.C. § 1983 provides:

> Every person who, under color any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was

> unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

INTRODUCTION

James Saylor is a Nebraska prisoner serving a sentence for second degree murder. Several other inmates attacked Saylor in May 2002. One of those inmates sexually assaulted him. As a result, Saylor has suffered from Post Traumatic Stress Disorder (PTSD) since then. Since the assault, the Respondents have followed a course of recurrent failure to provide Saylor with the care his condition requires.

In a separate negligence action, a state court awarded judgment in the amount of $250,000.00 to Saylor in 2010 against the Nebraska Department of Correctional Services (NDCS) for failing to protect him and failing to provide him with necessary treatment for PTSD in a timely fashion. The state court concluded, however, that from November 22, 2005, when psychiatrist Glen Christensen, M.D. began treating Saylor, through the time of trial in 2009, NDCS had provided Saylor with the necessary care for PTSD, which included regular consultations and treatment with Dr. Christensen. After the state court judgment, Respondents promptly returned to their former ways. Defendants terminated the services of Dr. Christensen, who had testified favorably with regard to Saylor's claim in the state court, and thereafter, simply and

generally, disrupted and reduced Saylor's care, and placed him in an isolated environment detrimental to his condition. This action followed.

STATEMENT OF THE CASE

A. The Treatment of James Saylor.

The District Court overruled the summary judgment motion of Randy Kohl, M.D.; Dennis Bakewell; Robert Houston; Cameron White, Ph.D.; Mark Weilage, Ph.D.; Fred Britten; and Kari Perez, Ph.D.. In so doing, the Court properly expressed "the plaintiff's version of the facts." *Scott v. Harris*, 550 U.S. 372, 378 (2007).

In overruling the Defendants' motion, the District Court penned a twenty-eight (28) page opinion. Sixteen (16) pages were devoted to a review of the summary judgment evidence; five (5) pages discussed the applicable law; and the Court discussed the evidence, in light of the law, in the remaining seven (7) pages of its opinion. The District Court made its review and analysis, as summary judgment practice traditionally requires, in the light most favorable to the plaintiff. The District Court's findings were:

> The court finds the evidence, viewed in the light most favorable to the plaintiff, demonstrates that there are genuine issues of material fact on whether the defendants were deliberately indifferent to his serious medical needs so as to violate the Eighth Amendment. There are genuine disputes concerning the

predicate facts material to the qualified immunity issue that make summary disposition inappropriate.

The constitutional right at issue arises under the Eighth Amendment. Denial of medical care that results in unnecessary suffering in prison is inconsistent with contemporary standards of decency and gives rise to a cause of action under 42 U.S.C. § 1983. The duty imposed on government officials to provide medical care to prisoners under the Eighth Amendment has been firmly established since 1976. The Eighth Circuit ruled as early as 1988 that psychological disorders may constitute a serious medical need. Consequently, the right to be free of deliberate indifference to serious medical needs, including mental health needs, was clearly established at the time of the challenged conduct by the defendants. Existing caselaw that would have put a reasonable correctional officer on notice that failing to appropriately treat PTSD resulting from a prison sexual assault would pose a risk of harm to an inmate and that ignoring that risk could amount to deliberate indifference to serious medical needs.

There is evidence, if credited, that tends to show that plaintiff had an objectively serious medical need and that the defendants were subjectively aware of the plaintiff's condition. The plaintiff has shown that the defendants were aware of facts that would lead to the inference that there was a substantial risk that the plaintiff would be harmed by

failing to properly treat his PTSD. The record shows the plaintiff repeatedly asked for more or different mental health treatment. Evidence indicates the defendants were aware of the plaintiff's PTSD diagnosis. The plaintiff's mental health care had been the subject of a state court action challenging the adequacy of mental health treatment afforded to plaintiff by the defendants. The state court found the Department of Corrections had been negligent in failing to provide the plaintiff with appropriate health care after his May 2002 sexual assault. Significantly, none of the defendants stated in their affidavits that they were not aware of the state court judgment. By virtue of the state court judgment, the defendants had actual notice of the risk of harm or injury to this plaintiff as a result of defendants' earlier provision of inadequate care. Evidence of that risk was adduced at the state court trial and defendants Kamal, Perez and Kohl actively participated in the trial. Although the standard for negligence liability is not the same as the standard for deliberate indifference, there is evidence from which a jury could infer that the risk of harm was so "obvious" that ignoring it could amount to deliberate indifference.

There is no dispute that the plaintiff was placed in administrative segregation from October or November 2010 until early 2014. The placement closely followed the state court judgment. The psychiatrist who had been found to have treated him appropriately was

terminated shortly after the state court judgment. There is evidence to support the plaintiff's contention that the defendants returned to the inadequate mental health practices that predated 2005 and that had been found wanting by the state court. The plaintiff has adduced evidence that the prison officials and medical personnel denied, delayed, and interfered with his medication regime. Evidence also shows that the defendants also returned to the practice of not responding or inadequately responding to the plaintiff's kites.

There is evidence of personal involvement by all of the defendants in the allegedly unconstitutional conduct. Dr. Kohl participated in Dr. Christensen's termination. Dr. White attended the meeting that resulted in Saylor's transfer to Tecumseh and approved the decision. Dr. Weilage was also present at the meeting and he personally treated Saylor. The record shows Dr. Kamal also attended the meeting. Dr. Perez supervised clinical activities and testified at trial in 2010. She also signed off on segregation status reviews. Warden Britten attended institutional classification meetings and approved administrative segregation for Saylor. Warden Bakewell was involved in the transfer and had authority to make the final decision on the transfer. Former Director Houston may not have personally participated in Saylor's medical treatment, but was responsible for prison policies and procedures and would have been aware of the specifics of Saylor's case from the state court action.

The claims against the individual defendants are not premised on vicarious liability, but on each defendant's personal knowledge of, and involvement in, unconstitutional acts. There are factual disputes concerning the level of the supervisors' knowledge of the pattern of allegedly unconstitutional acts. The plaintiff alleges, and has produced evidence that tends to show, that the supervisory defendants were aware of their subordinates' failure to properly devise and provide appropriate PTSD treatment, failure to properly dispense medication, or failure to provide appropriate conditions of confinement, and knew this failure posed a substantial risk of harm to the plaintiff. The state court findings provide evidence from which a jury could infer that the defendants had subjective knowledge of the plaintiff's condition and medical needs.

Resolution of the qualified immunity issue requires assessments of credibility that are not appropriate at this stage of the litigation. There are disputes with respect to whether the defendants appreciated the seriousness of the plaintiff's condition or recognized the extent of the risk of harm to the plaintiff. A jury crediting Saylor's evidence could find that the Director and Wardens actually knew that correctional officers had reverted to the conduct that the State court had found deficient and accordingly were on notice of the constitutional risk. Although the evidence indicates that the defendants were aware of the findings of the state court, issues remain as to whether they had a subjective

appreciation that failure to adhere to the medical treatment plan devised by Dr. Christensen would give rise to a serious medical need. There is some evidence that the defendants knew, by virtue of the findings in the state tort action, that the circumstances of the plaintiff's isolation would exacerbate his condition. The state court judgment put the defendants on notice of the parameters of appropriate community care. Defendants' own evidence establishes that the DCS policy is to provide comprehensive health care services by qualified personnel to protect the health and well-being of the inmates.

There is also evidence that supervisory officials tacitly authorized the conduct of subordinates in failing to properly treat the plaintiff, transferring him to Tecumseh and placing him in isolation. There is evidence from which a jury could infer that the supervisors' response to that knowledge was so inadequate as to show deliberate indifference to or tacit authorization of the alleged offensive practices. The evidence shows a long-standing pattern of conduct that involved, at various times, medication mix-ups, treatment delays, inadequate responses to kites, arguably punitive transfers and lengthy segregation of the plaintiff. Supervisory defendants failed to respond in the face of numerous complaints by the plaintiff. The supervisors' continued inaction in the face of documented complaints could amount to evidence from which a jury could find deliberate indifference. The supervisors were aware that the plaintiff had been

in isolation for extended periods of time. They were aware that the state court found the defendants had failed to closely and regularly monitor Saylor's condition.

This is not a case that involves a mere difference of opinion between the lay wishes of the inmate/patient and the professional diagnosis of the prison physician – there are conflicting expert opinions in the record with respect to the adequacy of care provided to the plaintiff. Though a difference of opinion between doctors on the adequacy of a treatment plan may not be conclusive, it illustrates the level of dispute over the predicate facts. Notably, because discovery was stayed pending resolution of this motion, the parties have not been deposed and subjected to cross-examination. The court is unable to afford much weight to the defendants' sparse and self-serving affidavits.

The court finds there are material disputed facts from which a jury could conclude that defendants were either plainly incompetent or knowingly violated the proscription against being deliberately indifferent to an inmate's serious medical needs. The facts, when viewed most favorably to the plaintiff, would permit a reasonable jury to find that Saylor's PTSD was a serious medical need, and the importance of proper mental health treatment was obvious from the diagnosis of PTSD, prescriptions for medication, and treatment that are reflected in medical records that were in the defendants' possession.

> Based on the evidence, a jury crediting the plaintiff's testimony could find the defendants knew of and deliberately disregarded the plaintiff's need for proper medication and appropriate therapy to deal with the symptoms of PTSD. Viewing the evidence in the light most favorable to the plaintiff, a jury could find that the defendants' conduct violated Saylor's Eighth Amendment rights.
>
> On this record, the court cannot find as a matter of law that the defendants are entitled to qualified immunity from suit for deliberate indifference to serious medical needs. The court finds there are genuine issues of material fact on issues that form the predicate of a constitutional claim.
>
> Further, the plaintiff's action is not barred by the statute of limitations. The record shows that the defendants' allegedly unconstitutional acts were part of a continuing violation that extends into the limitations period. App. 66-73. (Citations Omitted)

B. The Decisions Below.

Saylor sued the defendants under 42 U.S.C. § 1983, among other things, for being deliberately indifferent to his medical needs. App. 41-42. The named defendants filed a motion for summary judgment, on the basis of qualified immunity. The District Court overruled the motion, and, in so doing, determined that,

> the evidence, viewed in the light most favorable to the plaintiff, demonstrates that there

> are genuine issues of material fact on whether the defendants were deliberately indifferent to his serious medical needs so as to violate the Eighth Amendment. There are genuine disputes concerning the predicate facts material to the qualified immunity issue that make summary disposition inappropriate. App. 66.

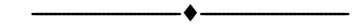
The named defendants then filed an interlocutory appeal with regard to the qualified immunity issue.

A panel of the Eighth Circuit reversed the District Court's determination, granted the named defendants motion, and dismissed the case. App. 36. The panel was not unanimous. The majority found,

> Saylor provides no specific evidence to show that any of the nonmedical defendants [Houston, Britten, and Bakewell] were involved in, or directly responsible for, his allegedly insufficient medical care. These defendants did not even participate in the multidisciplinary meeting regarding Saylor's transfer. Thus, because they did not have "a reason to believe (or actual knowledge) that prison doctors or their assistants [were] mistreating (or not treating) [Saylor]," they cannot be held liable for cruel and unusual punishment. . . . App. 10-11.
>
> As for the named medical defendants, Dr. Kohl, Dr. White, Dr. Wielage, and Dr. Perez, none were treating physicians. * * * [T]o be liable . . . the medical defendants had to personally violate Saylor's rights or be responsible for a systematic condition that violates the

> Constitution. * * * Throughout his time of incarceration, the record shows that Defendants met Saylor's medical needs beyond the minimum standard required. Defendants were aware of his medical needs and took steps to meet those needs. Because Saylor cannot show that Defendants acted with deliberate indifference, there was no deprivation of his Eighth Amendment rights, and thus, Defendants are entitled to qualified immunity. App. 11-12. (Footnotes and Citations Omitted)

Finally, with regard to Saylor's First and Fourteenth Amendment claims, the Panel majority found that, "Because none of Saylor's activities were protected and none of the Defendants' actions were retaliatory, Saylor has no First Amendment claim[;]" and, no Fourteenth Amendment claim because "[there was no] action by the government officials [which] 'impos[ed] atypical and significant hardship on [him] in relation to the ordinary incidents of prison life.'" App. 15-16.



REASONS FOR GRANTING THE PETITION

I. The Eighth Circuit's Decision Is Contrary To The Spirit, If Not The Letter, Of The Seventh Amendment.

This Court said, in *Baltimore & Carolina Line, Inc. v. Redman*, 295 U.S. 654, 657 (1935),

> The right of trial by jury thus preserved is the right which existed under the English common law when the amendment was adopted. The amendment not only preserves that right, but discloses a studied purpose to protect it from indirect impairment through possible enlargements of the power of reexamination existing under the common law, and, to that end, declares that "no fact tried by a jury shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."
>
> The aim of the amendment, as this Court has held, is to preserve the substance of the common law right of trial by jury, as distinguished from mere matters of form or procedure, and particularly to retain the common law distinction between the province of the court and that of the jury whereby, in the absence of express or implied consent to the contrary, issues of law are to be resolved by the court and issues of fact are to be determined by the jury under appropriate instructions by the court.

See, also, Unitherm Food Systems, Inc. v. Swift-Eckrich, Inc., 546 U.S. 394 (2006) (as to the vitality of *Baltimore & Carolina*).

Importing the resolution of what are truly Seventh Amendment fact issues, into summary judgment practice, will inevitably lead to a dimunition of the vital role juries play. Juries represent the "conscience" or "voice" of the community. *See, e.g.*, *Jones v. United*

States, 527 U.S. 373, 382 (1999) (capital case sentencings); *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 600 (1996) (Scalia, J., dissent) (punitive damages).

In this case, for example, the Eighth Circuit majority panel found that,

> For Houston, Britten, and Bakewell, the nonmedical defendants in this case, Saylor "must allege and show that the supervisor personally participated in or had direct responsibility for the alleged violations" or "that the supervisor actually knew of, and was deliberately indifferent to or tacitly authorized, the unconstitutional acts." * * * They must have also had a "sufficiently culpable state of mind." * * * Saylor provides no specific evidence to show that any of the nonmedical defendants were involved in, or directly responsible for, his allegedly insufficient medical care. These defendants did not even participate in the multidisciplinary meeting regarding Saylor's transfer. Thus, because they did not have "a reason to believe (or actual knowledge) that prison doctors or their assistants [were] mistreating (or not treating) [Saylor]," they cannot be held liable for cruel and unusual punishment. . . . App. 10-11.

In reaching its rendition of the facts, the panel majority made no specific references to any of the evidence that was before the District Court, nor did it indicate points of disagreement. The Panel majority simply wiped the fact slate clean, essentially bought

the story the Respondents were telling, and selected the new facts of the case.

The District Court, on the other hand, fully discussed the evidence before it, in accordance with the law:

> In his affidavit, the defendant makes several salient assertions. * * * [H]e states that Defendants . . . Warden Bakewell, and Warden Britten have indicated to him that they are aware that he suffers from PTSD and he states that they were "specifically and directly made aware" of his health care needs by virtue of the decision of the state tort action [in which Saylor prevailed]. * * * He asserts that shortly after the March 31, 2010, decision in his state tort case the defendants "returned to the indifferent pattern of behavior he had endured prior to November 2005." * * * Further, he states that he repeatedly asked for medical/health care from the defendants after March 31, 2010, but they have repeatedly refused to provide him with adequate care. * * * Saylor's claims of inappropriate or deficient care are supported by Dr. Christensen's opinion, medical evidence in the record and the state court order. * * * Saylor also states in his affidavit that on September 14, 2010, defendants took steps to transfer him back to Tecumseh. * * * He states that the transfer was physically and mentally traumatic and stressful. * * * He contends his PTSD became worse as a result of the transfer and he suffered other physical injuries that required medical attention at the

time. * * * Significantly, he contends he was housed in the Tecumseh [special management unit] from October 2010 until early [2014]. * * * While housed at SMU, he had strict limitations on movement, limited access to visitors, and limited access to his property, including legal materials. * * * He states he was kept indefinitely on administrative segregation because of his PTSD. * * * He also details his efforts to obtain medical care and presents a timeline of events. * * * The plaintiff has also submitted supplementary materials indicating that the records supplied by the state defendants are incomplete and therefore misleading and also offers a summary of incomplete documents. * * * There is evidence, if credited, that tends to show that plaintiff had an objectively serious medical need and that the defendants were subjectively aware of the plaintiff's condition. The plaintiff has shown that the defendants were aware of facts that would lead to the inference that there was a substantial risk that the plaintiff would be harmed by failing to properly treat his PTSD. The record shows the plaintiff repeatedly asked for more or different mental health treatment. * * * Significantly, none of the defendants stated in their affidavits that they were not aware of the state court judgment. By virtue of the state court judgment, the defendants had actual knowledge of the risk of harm or injury to this plaintiff as a result of defendants' earlier provision of inadequate care. * * * [T]here is evidence from which a jury could infer that the

risk of harm was so "obvious" that ignoring it could amount to deliberate indifference. * * * There is no dispute that the plaintiff was placed in administrative segregation from October or November 2010 until early 2014. The placement closely followed the state court judgment. The psychiatrist who had been found [by the state court] to have treated him appropriately was terminated shortly after the state court judgment. There is evidence to support the plaintiff's contention that the defendants returned to the inadequate mental health practices that predated 2005 and that had been found wanting by the state court. The plaintiff has adduced evidence that the prison officials and medical personnel denied, delayed, and interfered with his medication regime. Evidence also shows that the defendants also returned to the practice of not responding or inadequately responding to the plaintiff's kites. * * * There is evidence of personal involvement by all of the defendants in the allegedly unconstitutional conduct. * * * Warden Britten attended institutional classification meetings and approved administrative segregation for Saylor. Warden Bakewell was involved in the transfer and had authority to make the final decision on the transfer. Former director Huston [sic] may not have personally participated in Saylor's medical treatment, but was responsible for prison policies and procedures and would have been aware of the specifics of Saylor's case from the state court action. * * * The state court findings provide evidence from which a jury could

> infer that the defendants had subjective knowledge of the plaintiff's condition and medical needs. * * * A jury crediting Saylor's evidence could find that the Director and Wardens actually knew that correctional officers had reverted to the conduct that the State court had found deficient and accordingly were on notice of the constitutional risk. * * * There is also evidence that supervisory officials tacitly authorized the conduct of subordinates in failing to properly treat the plaintiff, transferring him to Tecumseh and placing him in isolation. There is evidence from which a jury could infer that the supervisors' response to that knowledge was so inadequate as to show deliberate indifference to or tacit authorization of the alleged offensive practices. App. 55-70.

During its discussion, the District Court made no less than twenty-five (25) specific and pinpoint references to the evidence before it. Consciously or not, the District Court considered the case in the context and spirit of the Seventh Amendment, making frequent references to the role of a jury, and rightly so.

The majority's determination with respect to defendants Houston, Britten, and Bakewell is but an example. The Panel majority, as it did with regard to the non-medical defendants, went to the same extreme with regard to the healthcare provided defendants. In each instance, the majority reached far beyond its proper role, and determined that its version of the facts was true. The majority, specifically, failed to so much

as consider – much less view – the facts from Saylor's view.

Deciding which version of facts is true is typically a jury function. Juries "are more representative institutions than is the judiciary; they reflect more accurately the composition and experiences of the community as a whole, and inevitably make decisions based on community values more reliably, than can that segment of the community that is selected for service on the bench." *Spaziano v. Florida*, 468 U.S. 447, 486-87 (1984) (Stevens, J., concurring in part and dissenting in part).

Juries were meant to play a central role in determining – as a parallel – and in policing the reasonableness of government action. Akil Reed Amar, *The Bill of Rights as a Constitution*, 100 Yale L. J. 1131, 1180 (March 1991) ("Reasonableness *vel non* was a classic question of fact for the jury; and the Seventh Amendment . . . would require the federal government to furnish a jury to any plaintiff-victim who demanded one, and protect that jury's finding of fact from being overturned by any judge or other government official."). Juries continue to perform this invaluable service. Resolving – in fact, reconstituting – matters of fact in the fashion the Panel majority has done in this case "as a legal matter," cuts juries out of the task of assessing the facts, and Constitutional claims will increasingly lack the essential input of ordinary citizens, while judges assume the task of parsing through questions of facts better suited to jurors. That is what occurred here – the panel majority whisked through the facts

anew, and decided it knew best what asserted facts were true and decided to render judgment for the government officials, rather than sticking to what is supposed to be an entirely legal decision on immunity.

II. The Decision Of The Eighth Circuit Is Contrary To The Teaching Of *Scott v. Harris*, And The Eighth Circuit's Own Precedent.

The Panel's decision is in conflict with its own, prior precedent, including, but not limited to its decision in *Walton v. Dawson*, 752 F.3d 1109 (8th Cir. 2014). Implicated as well, is this Court's decision in *Scott v. Harris*, *supra*. *Walton* stands for three propositions germane to the issues in this case. First, in the Eighth Circuit, in an appeal from a denial of qualified immunity, the Court accepts the district court's findings of fact, "to the extent they are not 'blatantly contradicted by the record.'" *Id.* at 1116. Second, a denial of qualified immunity is not "immediately appealable if it rests solely on a determination of 'whether or not the pretrial record sets forth a genuine issue of fact for trial.'" *Ibid.* Third, "if the parties agree on the law but disagree about the facts, there is no issue for [the appellate court] to decide on an interlocutory appeal." *Ibid.* The concept of being "blatantly contradicted by the record" means, "so 'blatantly contradicted by the record . . . that no reasonable jury could believe it.'" *Id.* at 1118 (Citations Omitted).

In denying the Appellants' motion, the district court entered a twenty-eight (28) page Memorandum

and Order, on December 22. While it is true that the district court made an extensive and detailed review of the applicable law relating to qualified immunity in its Memorandum and Order, the resulting denial of the Appellants' motion had nothing to do with the court's statement of the law, interpretation of the law, or application of the law of qualified immunity. To the contrary, in opening the Discussion portion of the Memorandum and Order, the court stated the following:

> The court finds the evidence, viewed in the light most favorable to the plaintiff, demonstrates that there are genuine issues of material fact on whether the defendants were deliberately indifferent to his serious medical needs so as to violate the Eighth Amendment. There are genuine disputes concerning the predicate facts material to the qualified immunity issue that make summary disposition inappropriate. App. 66.

The court next discussed the genuine issues it had found in the record. The court made additional and similar observations, later in its Memorandum and Order, such as, "Resolution of the qualified immunity issue requires assessments of credibility that are not appropriate at this stage of the litigation." App. 69. In conclusion, the district court stated: "**On this record**, the court cannot find as a matter of law that the defendants are entitled to qualified immunity from suit for deliberate indifference to serious medical needs. The court finds there are genuine issues of material

fact on issues that form the predicate of a constitutional claim." App. 72 (Emphasis Supplied). Appellee submits that the district court's decision on the Appellants' summary judgment motion is not of the "garden variety" the Panel opinion may suggest.

In the Eighth Circuit's own decision in *Walton v. Dawson*, 752 F.3d 1109, 1116 (8th Cir. 2014), the Court explained:

> A denial of qualified immunity at the summary judgment stage "is immediately appealable if it 'resolve[s] a dispute concerning an abstract issu[e] of law relating to qualified immunity.'" Such a denial is not immediately appealable if it rests solely on a determination of "whether or not the pretrial record sets forth a 'genuine' issue of fact for trial." Questions of law may be appealed right away, but questions of fact may not. (Citations Omitted)

Based upon the explanation in *Walton*, an examination of the district court's ruling, and the issue that was presented to the Eighth Circuit by the Respondents, Saylor suggests that jurisdiction of Respondents' appeal was, is, and has always been lacking.

More significantly, the Panel majority thoroughly trampled the axiom that in an appeal from a denial of qualified immunity, the Court accepts the district court's findings of fact, "to the extent they are not 'blatantly contradicted by the record.'" The concept of being "blatantly contradicted by the record," is one clearly illustrated in this Court's *Scott v. Harris*, 550 U.S. 372 (2007). The Panel was not unanimous in its

decision. In her thoughtful dissent, and with regard to Saylor's Eighth Amendment claims, Judge Kelly found the determinations of the district court reflected a thorough review of the record, and were well reasoned. App. 17-19; 36-38. While the majority, evidently, determined that the district court's conclusions were "blatantly contradicted" by the record, Judge Kelly found those same conclusions "well supported" by the record. Said Judge Kelly,

> The district court's findings, rather than being "blatantly contradicted by the record," are well supported and reflect careful consideration of the record evidence in the light most favorable to Saylor. * * * Based on these findings, it would be possible to conclude that the defendants "actually knew of, and [were] deliberately indifferent to or tacitly authorized" constitutionally deficient medical care for Saylor. App. 18-19; 37-38.

We suggest that the concept of findings being in "blatant contradiction" to the record is a hurdle at least as challenging as is the concept of "clear error" – if, in fact, the "blatant contradiction" standard is not a cut or two above "clear error." Previously, the Eighth Circuit has recognized the correctness of the clearly-erroneous analysis standard, which was so aptly described by the Seventh Circuit:

> [U]nder the clearly-erroneous standard, we cannot meddle with a prior decision of this or a lower court simply because we have doubts about its wisdom or think we would have

> reached a different result. To be clearly erroneous, a decision must strike us as more than just maybe or probably wrong; it must, as one member of this court recently stated during oral argument, strike us as wrong with the force of a five-week-old, unrefrigerated dead fish. To be clearly erroneous, then, the . . . decision [below] must be dead wrong. . . . *Parts and Electric Motors, Inc. v. Sterling Electric, Inc.*, 866 F.2d 228, 233 (7th Cir. 1988).

See, e.g., *In re Nevel Properties Corp.*, 765 F.3d 846, 850 (8th Cir. 2014) (quoting, in particular, the "dead fish" analogy).

In *Anderson v. City of Bessemer*, 470 U.S. 564, 573-74 (1985), this Court said:

> Although the meaning of the phrase "clearly erroneous" is not immediately apparent, certain general principles governing the exercise of the appellate court's power to overturn findings of a district court may be derived from our cases. The foremost of these principles, as the Fourth Circuit itself recognized, is that [a] finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. * * * This standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently. The reviewing court oversteps the bounds of its duty . . . if it undertakes to duplicate the role of the

> lower court. * * * In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues *de novo*. * * * If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that, had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous. (Citations Omitted)

Whether the bar is that of clear error – that being a "dead wrong" (or "dead fish") standard; or that of a different vocabulary, of being "blatantly contradicted by the record" – that being "so 'blatantly contradicted by the record . . . that no reasonable jury could believe it.'" *Walton v. Dawson*, *supra*, at 1118; the Panel's approach to this case creates uncertainty, and erodes existing precedent. Being "blatantly contradicted by the record" finds a defining moment in *Scott v. Harris*, *supra*, at 378-81; where the court had adopted a plaintiff's narrative description of a police chase as being imminently benign, whereas it ignored a videotape recording of the chase, which was in evidence, showed a scene very much removed from serenity, including high speeds, erratic driving, and disregard of traffic lights. The term "blatant" connotes that any reasonable mind would not differ with a conclusion.

Not only does the Panel majority misread this Court's "blatant contradiction" exception from *Scott*, but the Panel's decision to reformulate the facts in Saylor's case puts the Eighth Circuit clearly out of step with most of the other Federal Circuits. Typically, the Circuits view the "blatant contradiction" exception as having a very narrow bandwidth, and as requiring a virtually irrefutable obstacle – such as a videotape recording, *a la Scott*, to accepting any contrary view of the facts. In other words, true allegiance is given to viewing the facts in the light most favorable to the non-moving party. *See, e.g.*, *Williams v. Morgan*, Case No. 14-4066 (6th Cir. June 16, 2016); *Ayars v. Harrison*, Case No. 14-12250 (11th Cir. May 26, 2016); *Cook v. City of Philadelphia*, Case No. 15-2957 (3d Cir. May 18, 2016); *Thomas v. Dillard*, Case No. 13-55889 (9th Cir. May 5, 2016); *Phipps v. United States*, Case No. 14-424L (CFC April 26, 2016); *Nettles-Bey v. Williams*, Case No. 15-2704 (7th Cir. April 14, 2016); *Yates v. Terry*, Case No. 15-1555 (4th Cir. March 31, 2016); *Pennington v. Terry*, Case No. 15-5314 (March 23, 2016) (involving a videotape, similar to *Scott*; however, taking a view in the light most favorable to the non-moving party, it was determined the videotape was subject to more than a single interpretation); *Bartels v. Schwarz*, Case No. 15-1490 (2d Cir. March 17, 2016). In each instance, significant deference was shown by the Courts of Appeals toward the trial court's version of the facts.

III. The Eighth Circuit Decision Is In Direct Conflict With Controlling Supreme Court Precedent.

In a closely related vane, the Panel's decision is also contrary to the clear and latest teaching and admonitions of this Court, and, in particular, with the Court's decision in *Tolan v. Cotton*, ___ U.S. ___, 134 S.Ct. 1861, 188 L.Ed.2d 895 (2014), in which the Court found that, "[i]n articulating the factual context of the case, the Fifth Circuit failed to adhere to the axiom that in ruling on a motion for summary judgment, '[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor.'" "For that reason," said this Court, "we vacate its decision and remand the case for further proceedings consistent with this opinion." 134 S.Ct. at 1863. The teaching of *Tolan* is precisely the same teaching which guided the Panel's Judge Kelly in her thorough and thoughtful dissent to the majority's decision. What is all the more perplexing is that *Tolan* is at least generally familiar to the Eighth Circuit. *See, e.g.*, *Smith v. Conway County, Arkansas*, 759 F.3d 853, 858 (8th Cir. 2014).

Four jurists examined the summary judgment evidence of the parties in this case. Two of those jurists determined that the material facts were not in dispute; two of those jurists reached the diametrically opposite conclusion. Concededly, many – perhaps most – panel decisions are not unanimous, whether that be the Eighth Circuit, the Fifth Circuit, or this Court. Nonetheless, *in the context of summary judgment proceedings*, the

existence of such divided analysis, in and of itself, should be instructive about the result. When the jurists' minds differ, in the context we have in the case at bar, there should be little doubt but that the nonmovant should prevail.

The district court devoted fourteen (14) of its twenty-eight (28) page opinion to an analysis of the facts, in the light most favorable to Saylor. App. 44. Judge Kelly, in her dissent, summarized that analysis in a page. The Panel majority devoted less than four (4) pages of its opinion to the same task. In so doing, the majority essentially bought into that which the Appellants were selling. The majority believed it "would have reached a different result." "In articulating the factual context of the case, the [majority] failed to adhere to the axiom that in ruling on a motion for summary judgment, '[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor.'" *Tolan v. Cotton*, *supra*, 134 S.Ct. at 1863.

IV. The Eighth Circuit's Decision Is Erroneous In The Relief Granted.

The Panel majority's complete dismissal of the Respondents was and is indicative of the broad brush that the majority used in its analysis. At the time it denied the Respondents' summary judgment motion, the District Court also denied Saylor's "motion to defer or deny summary judgment (Filing No. 166) . . . as moot." Assuming the Panel meant what it said, that

the "judgment of the district court is reversed," that reversal, we submit, was a reversal of all aspects of the district court's Order of December 22, 2015. When coupled with the prior action of the district court, in denying Saylor's pending motion, the Panel's reversal should rightfully have resulted, not in a dismissal of the Respondents, but in a remand of the case to the District Court for consideration of Saylor's "motion to defer or deny summary judgment," on its merits. Saylor submits that the effect of the reversal of a judgment is commonly regarded as being a matter of the common law. The general common law rule is that "after reversal '[the] decree [is] no longer of any force or effect. The parties [are] in precisely the same situation as if no decree had been entered.'" *Stull v. YTB International, Inc.*, Civil 10-600-GPM (S.D.Ill. September 26, 2011) (citing *Kaplan v. Joseph*, 125 F.2d 602, 606 (7th Cir. 1942); *Keller v. Hall*, 111 F.2d 129, 131 (9th Cir. 1940); and, *Butler v. Eaton*, 141 U.S. 240, 244 (1891)); *see, also, Disher v. Citigroup Global Markets, Inc.*, 487 F.Supp.2d 1009, 1017 (S.D.Ill. 2007). The Panel majority decision was overzealous on many accounts. It was further mistaken in going beyond the stated, argued, and preserved issues on appeal.

CONCLUSION

The Petitioner hereby respectfully requests that this Court grant his Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

On November 13, 1787, Thomas Jefferson wrote to William Stephens Smith, "The tree of liberty must be refreshed from time to time with the blood of patriots & tyrants. It is its natural manure."

So, too, from time to time, must all of us be "refreshed" as to our roots, as to the underlying principles of our law, and to seeing to it that a just result be had by those who come before the Court.

Dated: June 27, 2016.

Respectfully submitted,

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United States Court of Appeals
for the Eighth Circuit

No. 14-3889

James Saylor

Plaintiff-Appellee

v.

State of Nebraska

Defendant

Randy Kohl, M.D.;
Dennis Bakewell; Robert Houston

Defendants-Appellants

Nebraska Department of Correctional Services;
Natalie Baker, M.D.; Mohammad Kamal, M.D.

Defendants

Cameron White, PhD.; Mark Weilage, PhD.;
Fred Britten; Kari Perez, PhD.

Defendants-Appellants

Correct Care Solutions, LLC.

Defendant

Appeal from United States District Court
for the District of Nebraska – Lincoln

Submitted: November 17, 2015
Filed: January 29, 2016 (Amended March 4, 2016)

Before RILEY, Chief Judge, BEAM and KELLY, Circuit Judges.

BEAM, Circuit Judge.

James Saylor sued the State of Nebraska, the Nebraska Department of Correctional Services (NDCS), Dr. Randy Kohl, Dennis Bakewell, Robert Houston, Dr. Natalie Baker, Dr. Mohammad Kamal, Dr. Cameron White, Dr. Mark Weilage, Fred Britten, Dr. Kari Perez, and Correct Care Solutions, LLC, (collectively "Defendants") under 42 U.S.C. § 1983 alleging violations of his rights under the First, Eighth, and Fourteenth Amendments of the United States Constitution. Defendants filed a motion to dismiss, and the district court dismissed Saylor's claims against the State of Nebraska and NDCS, as well as claims for monetary relief against individual defendants in their official capacities. The remaining defendants then moved for summary judgment on the basis of qualified immunity. The district court denied the motion. We reverse.

I. BACKGROUND

Saylor is a Nebraska inmate convicted of second-degree murder. Dr. Kohl is the Medical Services Director for NDCS. Other medical defendants include Dr.

White, Dr. Weilage, and Dr. Perez.[1] The nonmedical defendants include Houston, Warden Britten, and Warden Bakewell.[2] In 2002, while a prisoner at the Nebraska State Penitentiary (NSP), Saylor was allegedly attacked, beaten, and raped by other inmates. In 2005 Saylor was diagnosed with Post-Traumatic Stress Disorder (PTSD) as a result of the 2002 attack, and he began seeing Dr. Glen Christensen, a psychiatrist who contracted with NDCS. Saylor saw Dr. Christensen monthly for treatment. In April 2005, Saylor filed a complaint in state court alleging that the State of Nebraska and NDCS failed to protect him from the assault and failed to properly treat him after the assault. The trial was held in 2009, and in 2010 the state court entered an order in favor of Saylor, finding that the staff was negligent in failing to provide him with reasonably adequate protection from the 2002 assault. The court also found that Saylor received inadequate medical treatment from Dr. Kamal from 2002 to 2005. Saylor was awarded $250,000 in damages.

In April 2010, Saylor had his last meeting with Dr. Christensen because his contract with the prison was ending in May 2010. In addition, Saylor had monthly Mental Status Reviews with Cathy Moss, a Licensed Mental Health Practitioner. She informed Saylor that Dr. Kamal was the only psychiatrist available to work

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[1] Dr. Natalie Baker, Dr. Mohammad Kamal, and Correct Care Solutions do not appeal the district court's order.

[2] At the time of the events leading up to this lawsuit, Fred Britten was the warden of TSCI and Robert Houston was the warden of NSP.

with him at NSP. In May 2010, Saylor stated that he would not work with Dr. Kamal because Dr. Kohl had removed Dr. Kamal as Saylor's psychiatrist five years ago. Thus, Saylor agreed to forgo psychiatric care but wanted to continue taking his medications. A multidisciplinary hearing was held in 2010 to discuss the next step for Saylor because Dr. Christensen's contract ended and Saylor refused to work with Dr. Kamal. Defendants Dr. Weilage, Dr. Perez, and Dr. Kamal participated in the meeting, along with others not named in the lawsuit. The group suggested that Saylor could be transferred to Tecumseh State Correctional Institution (TSCI) because Dr. Baker, a psychiatrist providing care at TSCI, could work with Saylor. It is normal procedure for a correctional facility to transfer inmates who need mental health care beyond the resources available in their facility to a facility where such care is available. Warden Bakewell made the final decision, and Saylor was transferred to TSCI in September 2010. Saylor claims that the transfer was unnecessary, retaliatory, and caused his PTSD to worsen.

Saylor was initially classified as an inmate in Protective Custody[3] but was placed in the TSCI hospital

[3] When an inmate arrives at TSCI, he is classified. Classifications include "[d]emotion to, continuation of and promotion from all custody grades;" "unit, work and program assignment;" and "[a]ssignment to, continuation of and removal from Administrative Segregation." "Administrative Segregation includes: Administrative Confinement, Intensive Management, Protective Custody, and Transition Confinement." Every four months the prison conducts a review of inmates in Administrative Segregation.

upon arrival because he attempted to hang himself before he was transferred. While in the hospital he met with Dr. Baker. Dr. Baker wanted to gradually take Saylor off Seroquel, one of his medicines. He agreed and decided to continue taking Xanax. Throughout his time at TSCI, Saylor saw Dr. Baker every couple of months and was subjected to monthly Mental Status Reviews, but he often refused to participate. After a week in the hospital, Saylor was placed in the Special Management Unit (SMU) for refusing to move to Protective Custody. SMU is the only facility with single cells, and Saylor specifically asked for his own cell because of his PTSD and fear of roommates. In early October 2010, he was moved to Protective Custody, which houses two inmates per cell. In late October 2010, he was placed on immediate segregation again and housed in SMU because he feared for his safety. Thereafter, in the normal course, Saylor's classification was reviewed every four months per policy and procedure, and he was allowed to attend each hearing. As a result of these reviews, TSCI concluded that Saylor could be released into Protective Custody, but he rejected that proposal each time due to his fear of roommates. Therefore, Saylor remained in SMU for the duration of his time at TSCI.

Saylor brought suit against Dr. Kohl and the other named Defendants under 42 U.S.C. § 1983. He claims that Defendants retaliated against him in violation of the First Amendment by transferring him to TSCI and reclassifying him, that the transfer and classification review process violated his due process rights under

the Fourteenth Amendment, and that Defendants were deliberately indifferent to his PTSD in violation of the Eighth Amendment. Defendants filed a motion to dismiss, and the district court dismissed the State of Nebraska and NDCS from the case, and denied monetary relief against individual defendants in their official capacities. The remaining defendants then moved for summary judgment based on qualified immunity. The district court stated that "[t]he constitutional right at issue arises under the Eighth Amendment," and thus, did not directly discuss Saylor's First or Fourteenth Amendment claims. On the Eighth Amendment claim, however, the court held, "[T]here are genuine issues of material fact on whether the defendants were deliberately indifferent to his serious medical needs so as to violate the Eighth Amendment." Thus, the court held that summary judgment was inappropriate and denied qualified immunity. In this interlocutory appeal Defendants challenge the district court's denial of summary judgment based on qualified immunity.

II. DISCUSSION

"Faced with an interlocutory appeal from the denial of qualified immunity, we accept as true the district court's findings of fact to the extent they are not 'blatantly contradicted by the record,' and review the district court's conclusions of law de novo." *Walton v. Dawson,* 752 F.3d 1109, 1116 (8th Cir. 2014) (quoting *Scott v. Harris,* 550 U.S. 372, 380 (2007)). Summary judgment is only proper when there is no genuine issue

of material fact and the movant is entitled to judgment as a matter of law. *Turney v. Waterbury,* 375 F.3d 756, 759 (8th Cir. 2004). Generally, summary judgment based on qualified immunity is a legal question. *Id.* at 760. However, "[i]f the district court fails to make a factual finding on an issue relevant to our purely legal review, we 'determine what facts the district court, in the light most favorable to the nonmoving party, *likely* assumed.'" *Walton,* 752 F.3d at 1116 (quoting *Johnson v. Jones,* 515 U.S. 304, 319 (1995)). If this is impossible, summary judgment is improper, and the case must be remanded. *Id.* at 1117.

"Government officials performing discretionary functions are entitled to qualified immunity unless they violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Whisman v. Rinehart,* 119 F.3d 1303, 1309 (8th Cir. 1997). As in this case, qualified immunity is usually raised in a motion for summary judgment as an affirmative defense to the claims. *Id.* "To overcome the defense of qualified immunity, a plaintiff must show: (1) the facts, viewed in the light most favorable to the plaintiff, demonstrate the deprivation of a constitutional or statutory right; and (2) the right was clearly established at the time of the deprivation." *Howard v. Kan. City Police Dep't,* 570 F.3d 984, 988 (8th Cir. 2009).

Whether there has been a deprivation of a constitutional right is a fact-intensive analysis. The meaning of "clearly established," however, has been litigated extensively and given a more definite meaning. The

Eighth Circuit and the Supreme Court have held that a right is clearly established if "the 'contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right.'" *Buckley v. Rogerson,* 133 F.3d 1125, 1128 (8th Cir. 1998) (quoting *Anderson v. Creighton,* 483 U.S. 635, 640 (1987)). This is so that an "official is not required to guess the direction of future legal decisions." *Id.* Essentially, the law must be certain enough to give a "fair and clear warning." *United States v. Lanier,* 520 U.S. 259, 271 (1997). If a plaintiff can show relevant case law in the jurisdiction at the time of the incident that should have put the government employee on notice, qualified immunity is improper. *See Ashcroft v. al-Kidd,* 131 S. Ct. 2074, 2086 (2011) (Kennedy, J., concurring).

A. Eighth Amendment Claim

Saylor "alleges that the defendants were deliberately indifferent to his serious medical needs in failing to properly treat him for [PTSD]." Here, Saylor essentially claims that his level of care after Dr. Christensen left NSP was so low as to constitute cruel and unusual punishment. The district court concluded that Defendants were not entitled to summary judgment based on qualified immunity for this claim because "[t]here are genuine disputes concerning the predicate facts material to the qualified immunity issue."[4] Defendants

[4] Although we do not have jurisdiction "at this juncture to decide whether 'the district court's determination of evidentiary

argue that this decision was in error. After reviewing the facts determined by the district court, as well as those likely assumed, we agree.

"The Eighth Amendment 'prohibits the infliction of cruel and unusual punishments on those convicted of crimes.'" *Nelson v. Corr. Med. Servs.,* 583 F.3d 522, 528 (8th Cir. 2009) (quoting *Wilson v. Seiter,* 501 U.S. 294, 296-97 (1991)). In regards to prison conditions, confinement, and medical care while in prison, "the constitutional question . . . is whether [Defendants] acted with 'deliberate indifference.'" *Id.* (quoting *Wilson,* 501 U.S. at 3031). "A prison official is deliberately indifferent if she 'knows of and disregards' a serious medical need or a substantial risk to an inmate's health or safety." *Id.* (quoting *Farmer v. Brennan,* 511 U.S. 825, 837 (1994)). The deliberate indifference standard has both objective and subjective prongs. *Id.* at 529. The plaintiff must prove "that he suffered from an objectively serious medical need" and "that

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sufficiency' was correct," *Walton,* 752 F.3d at 1116 (quoting *Thomas v. Talley,* 251 F.3d 743, 747 (8th Cir. 2001)),

> we [do] have jurisdiction to decide, viewing the facts in the light most favorable to [the] plaintiff[ ], whether a reasonable fact-finder could find a violation of plaintiff['s] rights, whether the law establishing the violation was clearly established at the time in question, what was known to a person who might be shielded by qualified immunity, and the reasonableness of defendant[s'] actions.

S.M. v. Krigbaum, 808 F.3d 335, 340 (8th Cir. 2015). Here, we decide the "purely legal matter" of whether "the denial [of qualified immunity] was erroneous." *Payne v. Britten,* 749 F.3d 697, 700 (8th Cir. 2014).

[Defendants] actually knew of but deliberately disregarded his serious medical need." *Scott v. Benson,* 742 F.3d 335, 340 (8th Cir. 2014). A medical condition is "objectively serious" if the prisoner was diagnosed by a doctor or it is so obvious that a lay person would recognize the medical need. *Id.* It is not contested that Saylor had a serious medical need; Dr. Christensen diagnosed Saylor with PTSD in 2005. Here, the subjective prong is the main issue. The subjective prong of deliberate indifference is an extremely high standard that requires a mental state of "more . . . than gross negligence." *Fourte v. Faulkner Cty., Ark.,* 746 F.3d 384, 387 (8th Cir. 2014) (quoting *Jolly v. Knudsen,* 205 F.3d 1094, 1096 (8th Cir. 2000)). It "requires a mental state 'akin to criminal recklessness.'" *Jackson v. Buckman,* 756 F.3d 1060, 1065 (8th Cir. 2004) (quoting *Scott,* 742 F.3d at 340). Even medical malpractice does not automatically constitute deliberate indifference. *Id.* at 1065-66.

For Houston, Britten, and Bakewell, the nonmedical defendants in this case, Saylor "must allege and show that the supervisor personally participated in or had direct responsibility for the alleged violations" or "that the supervisor actually knew of, and was deliberately indifferent to or tacitly authorized, the unconstitutional acts." *McDowell v. Jones,* 990 F.2d 433, 435 (8th Cir. 1993). They must have also had a "sufficiently culpable state of mind." *Farmer,* 511 U.S. at 834 (quoting *Wilson,* 501 U.S. at 297). Saylor provides no specific evidence to show that any of the nonmedical defendants were involved in, or directly responsible for, his

allegedly insufficient medical care.[5] These defendants did not even participate in the multidisciplinary meeting regarding Saylor's transfer. Thus, because they did not have "a reason to believe (or actual knowledge) that prison doctors or their assistants [were] mistreating (or not treating) [Saylor]," they cannot be held liable for cruel and unusual punishment in violation of the Eighth Amendment. *Hayes v. Snyder,* 546 F.3d 516, 527 (7th Cir. 2008) (quoting *Spruill v. Gillis,* 372 F.3d 218, 236 (3d Cir. 2004)).

As for the named medical defendants, Dr. Kohl, Dr. White, Dr. Weilage, and Dr. Perez, none were treating physicians. Thus, these defendants also acted in a supervisory capacity. "To impose supervisory liability, other misconduct [by the medical defendants] must be very similar to the conduct giving rise to liability." *Livers v. Schenck,* 700 F.3d 340, 356 (8th Cir. 2012). This means that there is no real vicarious liability. *See McDowell,* 990 F.2d at 435. Rather, to be liable under § 1983 the medical defendants had to personally violate Saylor's rights or be responsible for a systematic

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[5] Saylor generally states in his complaint that "Defendants Bakewell, Britten and Houston are equally responsible participants in the Plaintiff's transfer, and any reduction in health care services to the Plaintiff [that] resulted from such transfer." Without any specifics, Saylor claims that the nonmedical defendants "continually exposed [him] to intolerable, horrifying, and medically detrimental conditions while he [was] housed at TSCI since 2010." These indiscriminate grievances are not enough to prove that they knew of, participated in, or implicitly authorized, the mistreatment or nontreatment of Saylor, such as is necessary to maintain a claim of deliberate indifference under the Eighth Amendment.

condition that violates the Constitution. *Livers,* 700 F.3d at 357. Saylor's main argument is that the treatment that occurred after Dr. Christensen left NSP rises to the level of cruel and unusual punishment. Dr. Christensen's treatment plan was three-part: regular psychotherapy treatment, medication, and a safe environment. The medical defendants attempted to provide Saylor with another psychiatrist at NSP, ultimately found him another psychiatrist at TSCI, continued medication as they saw fit within their independent medical judgment, and gave him his requested private cell. To the extent there was any change in Dr. Christensen's treatment plan, Saylor requested some and agreed to other deviations. Specifically, Saylor stated he was willing to forgo seeing a doctor so long as he could continue taking his medications. After the meeting with Dr. Baker wherein she suggested easing him off Seroquel because it did not seem to be helping and was causing low blood pressure, Saylor agreed to continue taking Xanax.

Throughout his time of incarceration, the record shows that Defendants met Saylor's medical needs beyond the minimum standard required. Defendants were aware of his medical needs and took steps to meet those needs. Because Saylor cannot show that Defendants acted with deliberate indifference, there was no deprivation of his Eighth Amendment rights, and thus, Defendants are entitled to qualified immunity.

B. First and Fourteenth Amendment Claims

Defendants claim that the district court erred by failing to fully discuss the denial of summary judgment based on qualified immunity with regard to these claims. "It is 'certain, and the case law is clear, that [the officials] are entitled to a *thorough determination* of their claim[s] of qualified immunity if that immunity is to mean anything at all.'" *Payne,* 749 F.3d at 701 (first and third alteration in original) (emphasis added) (quoting *O'Neil v. City of Iowa City, Iowa,* 496 F.3d 915, 917 (8th Cir. 2007)). A thorough determination discusses all of the claims litigated. Here, the court denied qualified immunity by generally denying Defendants' motion for summary judgment but only analyzed the Eighth Amendment claim. Nonetheless, a review of the facts determined by the district court, as well as those likely assumed, reveals no violation of either the First or Fourteenth Amendment, and thus, we reverse and dismiss these claims as well.

Saylor claims that in retaliation against him for filing the state tort case and in violation of the First Amendment, Defendants (1) terminated Dr. Christensen so that Saylor no longer received adequate psychiatric care, (2) discontinued his medicines, (3) refused to provide him with psychotherapy, (4) transferred him to a new facility, and (5) kept him isolated in Administrative Segregation without review. Similarly, Saylor's Fourteenth Amendment substantive due process claim arises due to his transfer to TSCI and his subsequent confinement in SMU.

In order to succeed on a First Amendment retaliation claim Saylor must show that "(1) he engaged in a protected activity, (2) the government official took adverse action against him that would chill a person of ordinary firmness from continuing in the activity, and (3) the adverse action was motivated at least in part by the exercise of the protected activity." *Revels v. Vincenz,* 382 F.3d 870, 876 (8th Cir. 2004). The *reason* for the government official's action must have been to prevent the plaintiff from engaging in the protected activity. *Id.*

First, "inmates have no constitutional right to receive a particular or requested course of treatment, and prison doctors remain free to exercise their independent medical judgment." *Meuir v. Greene Cty. Jail Emps.,* 487 F.3d 1115, 1118 (8th Cir. 2007) (quoting *Dulany v. Carnahan,* 132 F.3d 1234, 1239 (8th Cir. 1997)). As such, Defendants violated no constitutional right by assigning Saylor to another psychiatrist when Dr. Christensen's contract with NDCS ended or by changing Saylor's medication at the direction of a doctor. Second, "a prisoner enjoys no constitutional right to remain in a particular institution." *Goff v. Burton,* 7 F.3d 734, 737 (8th Cir. 1993) (quoting *Murphy v. Mo. Dep't of Corr.,* 769 F.2d 502, 503 (8th Cir. 1985)). In fact, "prison officials 'may transfer a prisoner for whatever reason or for no reason at all.'" *Id.* (quoting *Olim v. Wakinekona,* 461 U.S. 238, 250 (1983)). However, retaliation against a prisoner cannot be the motivation behind the transfer. *Id.* Here, the clearly stated, nonretaliatory reason for the transfer was to provide Saylor with necessary psychiatric care. He refused to see Dr.

Kamal at NSP, and Dr. Baker was available to work with Saylor at TSCI. Finally, Saylor was kept in Administrative Segregation, specifically SMU, because he requested his own cell due to his PTSD. This is the only area with single prisoner cells. Although he was cleared to be released into Protective Custody, he would have had to share a cell with a roommate, which he refused to do. It is blatantly contradictory to request a private cell with no roommates and then complain about isolation. Because none of Saylor's activities were protected and none of Defendants' actions were retaliatory, Saylor has no First Amendment claim.

"The Fourteenth Amendment's Due Process Clause protects persons against deprivations of life, liberty, or property." *Wilkinson v. Austin,* 545 U.S. 209, 221 (2005). To state a claim under the Due Process Clause, some interest must first be violated. *See Singleton v. Cecil,* 176 F.3d 419, 424 (8th Cir. 1999). "A liberty interest may arise from the Constitution itself, by reason of guarantees implicit in the word 'liberty,' or it may arise from an expectation or interest created by state laws or policies." *Wilkinson,* 545 U.S. at 221. In most cases, substantive due process violations involve "marriage, family, procreation, and the right to bodily integrity." *Singleton,* 176 F.3d at 425 (quoting *Albright v. Oliver,* 510 U.S. 266, 272 (1994)). More generally, the Supreme Court has held that substantive due process "protects those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition,' and 'implicit in the concept of ordered

liberty.'" *Id.* (quoting *Washington v. Glucksberg,* 521 U.S. 702, 721 (1997)).

> In regards to Saylor's transfer from NSP to TSCI:
>
> > the Due Process Clause in and of itself [does not] protect a duly convicted prisoner against transfer from one institution to another within the state prison system. Confinement in any of the State's institutions is within the normal limits or range of custody which the conviction has authorized the State to impose.

Meachum v. Fano, 427 U.S. 215, 225 (1976). Here, Saylor was transferred to a comparable prison for the sole purpose of obtaining psychiatric care. This does not violate the Due Process Clause of the Fourteenth Amendment, and neither does Saylor's confinement in SMU once he arrived at TSCI. Saylor only has a claim under the Fourteenth Amendment if the action by the government officials "impose[d] atypical and significant hardship on [him] in relation to the ordinary incidents of prison life." *Sandin v. Conner,* 515 U.S. 472, 484 (1995). Segregation due to a prisoner's request to be kept in a single prisoner cell because of PTSD is not an atypical or a significant hardship. Rather, TSCI made special accommodations for Saylor. Accordingly, there has been no constitutional violation, and thus, Saylor has no cognizable Fourteenth Amendment claim. Defendants are entitled to qualified immunity on these two issues.

III. CONCLUSION

The judgment of the district court is reversed, and this case is remanded to the district court with directions to dismiss the appellants and for the entry of any further necessary orders concerning the non-appealing parties as are consistent with the rulings of this court.

KELLY, Circuit Judge, dissenting.

The district court found that the evidence in this case, viewed in the light most favorable to Saylor, demonstrated a genuine dispute as to the facts relevant to qualified immunity. I agree with the district court that the evidence presented by Saylor, though not dispositive as to the merits of his claim, precludes summary judgment on the basis of qualified immunity.

In Saylor's previous state tort lawsuit, the state court found that the Department of Corrections had negligently failed to provide adequate care for Saylor's PTSD between June 11, 2002, and November 22, 2005. As the district court noted, the defendants presented no evidence suggesting that they were unaware of the prior state court judgment. For the purposes of the summary judgment analysis, there is no genuine dispute that all the defendants were actually aware of Saylor's serious medical needs and the risk of harm if he were denied adequate care. The district court found that Saylor had produced evidence – including his treatment records, his communications with prison

staff, records of his transfer and administrative segregation, the affidavit of Dr. Christensen, and his own affidavit – to support his contention that the Department of Corrections had reverted to providing inadequate medical treatment as they had previously. This evidence, viewed in the light most favorable to Saylor, tends to show that shortly after the judgment in his state tort case, Saylor's treatment by Dr. Christensen was abruptly discontinued; his treatment plan, including his drug therapy, was interrupted; the responsible Department of Corrections officials failed to develop an appropriate alternative treatment plan; prison staff returned to their prior practice of failing to respond or responding inadequately to Saylor's communications; and Saylor was transferred and placed on the most restrictive confinement classification possible, despite that classification's incompatibility with his health needs. The evidence does not establish that Saylor caused or consented to the changes to his treatment, or that Saylor's transfer and placement in the Special Management Unit were necessary and consistent with an adequate treatment plan. Moreover, the district court found that there was sufficient evidence of each defendant's involvement in Saylor's care to establish that they may have been personally aware of or involved in this allegedly unconstitutional treatment.

The district court's factual findings, rather than being "blatantly contradicted by the record," are well supported and reflect careful consideration of the record evidence in the light most favorable to Saylor. *Walton,* 752 F.3d at 1116. Based on these findings, it would

be possible to conclude that the defendants "actually knew of, and [were] deliberately indifferent to or tacitly authorized" constitutionally deficient medical care for Saylor. *McDowell,* 990 F.2d at 435. The facts relevant to qualified immunity are genuinely disputed, precluding summary judgment on this basis. I would therefore affirm the district court's denial of summary judgment as to Saylor's Eighth Amendment deliberate indifference claim.

With regard to Saylor's First and Fourteenth Amendment claims, the district court did not make any factual determinations or conduct the required "thorough determination" of the defendants' entitlement to qualified immunity. *See Payne,* 749 F.3d at 701 (quoting *O'Neil,* 496 F.3d at 918). Without the district court's factual findings, we have no basis for our review of the grant or denial of qualified immunity. Therefore, when the district court fails or refuses to rule on qualified immunity, "our court only exercises its jurisdiction to compel the district court to decide the qualified immunity question." *Id.* I would remand Saylor's First and Fourteenth Amendment claims to the district court for it to properly conduct the qualified immunity analysis.

United States Court of Appeals
for the Eighth Circuit

No. 14-3889

James Saylor

Plaintiff-Appellee

v.

State of Nebraska

Defendant

Randy Kohl, M.D.;
Dennis Bakewell; Robert Houston

Defendants-Appellants

Nebraska Department of Correctional Services;
Natalie Baker, M.D.; Mohammad Kamal, M.D.

Defendants

Cameron White, PhD.; Mark Weilage, PhD.;
Fred Britten; Kari Perez, PhD.

Defendants-Appellants

Correct Care Solutions, LLC.

Defendant

Appeal from United States District Court
for the District of Nebraska – Lincoln

Submitted: November 17, 2015
Filed: January 29, 2016

Before RILEY, Chief Judge, BEAM and KELLY, Circuit Judges.

BEAM, Circuit Judge.

James Saylor sued the State of Nebraska, the Nebraska Department of Correctional Services (NDCS), Dr. Randy Kohl, Dennis Bakewell, Robert Houston, Dr. Natalie Baker, Dr. Mohammad Kamal, Dr. Cameron White, Dr. Mark Weilage, Fred Britten, Dr. Kari Perez, and Correct Care Solutions, LLC, (collectively "Defendants") under 42 U.S.C. § 1983 alleging violations of his rights under the First, Eighth, and Fourteenth Amendments of the United States Constitution. Defendants filed a motion to dismiss, and the district court dismissed Saylor's claims against the State of Nebraska and NDCS, as well as claims for monetary relief against individual defendants in their official capacities. The remaining defendants then moved for summary judgment on the basis of qualified immunity. The district court denied the motion. We reverse.

I. BACKGROUND

Saylor is a Nebraska inmate convicted of second-degree murder. Dr. Kohl is the Medical Services Director for NDCS. Other medical defendants include Dr.

White, Dr. Weilage, and Dr. Perez.[1] The nonmedical defendants include Houston, Warden Britten, and Warden Bakewell.[2] In 2002, while a prisoner at the Nebraska State Penitentiary (NSP), Saylor was allegedly attacked, beaten, and raped by other inmates. In 2005 Saylor was diagnosed with Post-Traumatic Stress Disorder (PTSD) as a result of the 2002 attack, and he began seeing Dr. Glen Christensen, a psychiatrist who contracted with NDCS. Saylor saw Dr. Christensen monthly for treatment. In April 2005, Saylor filed a complaint in state court alleging that the State of Nebraska and NDCS failed to protect him from the assault and failed to properly treat him after the assault. The trial was held in 2009, and in 2010 the state court entered an order in favor of Saylor, finding that the staff was negligent in failing to provide him with reasonably adequate protection from the 2002 assault. The court also found that Saylor received inadequate medical treatment from Dr. Kamal from 2002 to 2005. Saylor was awarded $250,000 in damages.

In April 2010, Saylor had his last meeting with Dr. Christensen because his contract with the prison was ending in May 2010. In addition, Saylor had monthly Mental Status Reviews with Cathy Moss, a Licensed Mental Health Practitioner. She informed Saylor that Dr. Kamal was the only psychiatrist available to work

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[1] Dr. Natalie Baker, Dr. Mohammad Kamal, and Correct Care Solutions do not appeal the district court's order.

[2] At the time of the events leading up to this lawsuit, Fred Britten was the warden of TSCI and Robert Houston was the warden of NSP.

with him at NSP. In May 2010, Saylor stated that he would not work with Dr. Kamal because Dr. Kohl had removed Dr. Kamal as Saylor's psychiatrist five years ago. Thus, Saylor agreed to forgo psychiatric care but wanted to continue taking his medications. A multidisciplinary hearing was held in 2010 to discuss the next step for Saylor because Dr. Christensen's contract ended and Saylor refused to work with Dr. Kamal. Defendants Dr. Weilage, Dr. Perez, and Dr. Kamal participated in the meeting, along with others not named in the lawsuit. The group suggested that Saylor could be transferred to Tecumseh State Correctional Institution (TSCI) because Dr. Baker, a psychiatrist providing care at TSCI, could work with Saylor. It is normal procedure for a correctional facility to transfer inmates who need mental health care beyond the resources available in their facility to a facility where such care is available. Warden Bakewell made the final decision, and Saylor was transferred to TSCI in September 2010. Saylor claims that the transfer was unnecessary, retaliatory, and caused his PTSD to worsen.

Saylor was initially classified as an inmate in Protective Custody[3] but was placed in the TSCI hospital

[3] When an inmate arrives at TSCI, he is classified. Classifications include "[d]emotion to, continuation of and promotion from all custody grades;" "unit, work and program assignment;" and "[a]ssignment to, continuation of and removal from Administrative Segregation." "Administrative Segregation includes: Administrative Confinement, Intensive Management, Protective Custody, and Transition Confinement." Every four months the prison conducts a review of inmates in Administrative Segregation.

upon arrival because he attempted to hang himself before he was transferred. While in the hospital he met with Dr. Baker. Dr. Baker wanted to gradually take Saylor off Seroquel, one of his medicines. He agreed and decided to continue taking Xanax. Throughout his time at TSCI, Saylor saw Dr. Baker every couple of months and was subjected to monthly Mental Status Reviews, but he often refused to participate. After a week in the hospital, Saylor was placed in the Special Management Unit (SMU) for refusing to move to Protective Custody. SMU is the only facility with single cells, and Saylor specifically asked for his own cell because of his PTSD and fear of roommates. In early October 2010, he was moved to Protective Custody, which houses two inmates per cell. In late October 2010, he was placed on immediate segregation again and housed in SMU because he feared for his safety. Thereafter, in the normal course, Saylor's classification was reviewed every four months per policy and procedure, and he was allowed to attend each hearing. As a result of these reviews, TSCI concluded that Saylor could be released into Protective Custody, but he rejected that proposal each time due to his fear of roommates. Therefore, Saylor remained in SMU for the duration of his time at TSCI.

Saylor brought suit against Dr. Kohl and the other named Defendants under 42 U.S.C. § 1983. He claims that Defendants retaliated against him in violation of the First Amendment by transferring him to TSCI and reclassifying him, that the transfer and classification review process violated his due process rights under

the Fourteenth Amendment, and that Defendants were deliberately indifferent to his PTSD in violation of the Eighth Amendment. Defendants filed a motion to dismiss, and the district court dismissed the State of Nebraska and NDCS from the case, and denied monetary relief against individual defendants in their official capacities. The remaining defendants then moved for summary judgment based on qualified immunity. The district court stated that "[t]he constitutional right at issue arises under the Eighth Amendment," and thus, did not directly discuss Saylor's First or Fourteenth Amendment claims. On the Eighth Amendment claim, however, the court held, "[T]here are genuine issues of material fact on whether the defendants were deliberately indifferent to his serious medical needs so as to violate the Eighth Amendment." Thus, the court held that summary judgment was inappropriate and denied qualified immunity. In this interlocutory appeal Defendants challenge the district court's denial of summary judgment based on qualified immunity.

II. DISCUSSION

"Faced with an interlocutory appeal from the denial of qualified immunity, we accept as true the district court's findings of fact to the extent they are not 'blatantly contradicted by the record,' and review the district court's conclusions of law de novo." *Walton v. Dawson*, 752 F.3d 1109, 1116 (8th Cir. 2014) (quoting *Scott v. Harris*, 550 U.S. 372, 380 (2007)). Summary judgment is only proper when there is no genuine issue

of material fact and the movant is entitled to judgment as a matter of law. *Turney v. Waterbury*, 375 F.3d 756, 759 (8th Cir. 2004). Generally, summary judgment based on qualified immunity is a legal question. *Id.* at 760. However, "[i]f the district court fails to make a factual finding on an issue relevant to our purely legal review, we 'determine what facts the district court, in the light most favorable to the nonmoving party, *likely* assumed.'" *Walton*, 752 F.3d at 1116 (quoting *Johnson v. Jones*, 515 U.S. 304, 319 (1995)). If this is impossible, summary judgment is improper, and the case must be remanded. *Id.* at 1117.

"Government officials performing discretionary functions are entitled to qualified immunity unless they violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Whisman v. Rinehart*, 119 F.3d 1303, 1309 (8th Cir. 1997). As in this case, qualified immunity is usually raised in a motion for summary judgment as an affirmative defense to the claims. *Id.* "To overcome the defense of qualified immunity, a plaintiff must show: (1) the facts, viewed in the light most favorable to the plaintiff, demonstrate the deprivation of a constitutional or statutory right; and (2) the right was clearly established at the time of the deprivation." *Howard v. Kan. City Police Dep't*, 570 F.3d 984, 988 (8th Cir. 2009).

Whether there has been a deprivation of a constitutional right is a fact-intensive analysis. The meaning of "clearly established," however, has been litigated extensively and given a more definite meaning. The Eighth Circuit and the Supreme Court have held that

a right is clearly established if "the 'contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right.'" *Buckley v. Rogerson*, 133 F.3d 1125, 1128 (8th Cir. 1998) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). This is so that an "official is not required to guess the direction of future legal decisions." *Id.* Essentially, the law must be certain enough to give a "fair and clear warning." *United States v. Lanier*, 520 U.S. 259, 271 (1997). If a plaintiff can show relevant case law in the jurisdiction at the time of the incident that should have put the government employee on notice, qualified immunity is improper. *See Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2086 (2011) (Kennedy, J., concurring).

A. Eighth Amendment Claim

Saylor "alleges that the defendants were deliberately indifferent to his serious medical needs in failing to properly treat him for [PTSD]." Here, Saylor essentially claims that his level of care after Dr. Christensen left NSP was so low as to constitute cruel and unusual punishment. The district court concluded that Defendants were not entitled to summary judgment based on qualified immunity for this claim because "[t]here are genuine disputes concerning the predicate facts material to the qualified immunity issue."[4] Defendants

[4] Although we do not have jurisdiction "at this juncture to decide whether 'the district court's determination of evidentiary sufficiency' was correct," Walton, 752 F.3d at 1116 (quoting *Thomas v. Talley*, 251 F.3d 743, 747 (8th Cir. 2001)),

argue that this decision was in error. After reviewing the facts determined by the district court, as well as those likely assumed, we agree. "The Eighth Amendment 'prohibits the infliction of cruel and unusual punishments on those convicted of crimes.'" *Nelson v. Corr. Med. Servs.*, 583 F.3d 522, 528 (8th Cir. 2009) (quoting *Wilson v. Seiter*, 501 U.S. 294, 296-97 (1991)). In regards to prison conditions, confinement, and medical care while in prison, "the constitutional question . . . is whether [Defendants] acted with 'deliberate indifference.'" *Id.* (quoting *Wilson*, 501 U.S. at 303). "A prison official is deliberately indifferent if she 'knows of and disregards' a serious medical need or a substantial risk to an inmate's health or safety." *Id.* (quoting *Farmer v. Brennan*, 511 U.S. 825, 837 (1994)). The deliberate indifference standard has both objective and subjective prongs. *Id.* at 529. The plaintiff must prove "that he suffered from an objectively serious medical need" and "that [Defendants] actually knew of but deliberately disregarded his serious medical need." *Scott v. Benson*, 742 F.3d 335, 340 (8th Cir. 2014). A medical condition

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> we [do] have jurisdiction to decide, viewing the facts in the light most favorable to [the] plaintiff[ ], whether a reasonable fact-finder could find a violation of plaintiff['s] rights, whether the law establishing the violation was clearly established at the time in question, what was known to a person who might be shielded by qualified immunity, and the reasonableness of defendant[s'] actions.

S.M. v. Krigbaum, 808 F.3d 335, 340 (8th Cir. 2015). Here, we decide the "purely legal matter" of whether "the denial [of qualified immunity] was erroneous." *Payne v. Britten*, 749 F.3d 697, 700 (8th Cir. 2014).

is "objectively serious" if the prisoner was diagnosed by a doctor or it is so obvious that a lay person would recognize the medical need. *Id.* It is not contested that Saylor had a serious medical need; Dr. Christensen diagnosed Saylor with PTSD in 2005. Here, the subjective prong is the main issue. The subjective prong of deliberate indifference is an extremely high standard that requires a mental state of "more . . . than gross negligence." *Fourte v. Faulkner Cty., Ark.*, 746 F.3d 384, 387 (8th Cir. 2014) (quoting *Jolly v. Knudsen*, 205 F.3d 1094, 1096 (8th Cir. 2000)). It "requires a mental state 'akin to criminal recklessness.'" *Jackson v. Buckman*, 756 F.3d 1060, 1065 (8th Cir. 2004) (quoting *Scott*, 742 F.3d at 340). Even medical malpractice does not automatically constitute deliberate indifference. *Id.* at 1065-66.

For Houston, Britten, and Bakewell, the nonmedical defendants in this case, Saylor "must allege and show that the supervisor personally participated in or had direct responsibility for the alleged violations" or "that the supervisor actually knew of, and was deliberately indifferent to or tacitly authorized, the unconstitutional acts." *McDowell v. Jones*, 990 F.2d 433, 435 (8th Cir. 1993). They must have also had a "sufficiently culpable state of mind." *Farmer*, 511 U.S. at 834 (quoting Wilson, 501 U.S. at 297). Saylor provides no specific evidence to show that any of the nonmedical defendants were involved in, or directly responsible for, his

allegedly insufficient medical care.[5] These defendants did not even participate in the multidisciplinary meeting regarding Saylor's transfer. Thus, because they did not have "a reason to believe (or actual knowledge) that prison doctors or their assistants [were] mistreating (or not treating) [Saylor]," they cannot be held liable for cruel and unusual punishment in violation of the Eighth Amendment. *Hayes v. Snyder*, 546 F.3d 516, 527 (7th Cir. 2008) (quoting *Spruill v. Gillis*, 372 F.3d 218, 236 (3d Cir. 2004)).

As for the named medical defendants, Dr. Kohl, Dr. White, Dr. Weilage, and Dr. Perez, none were treating physicians. Thus, these defendants also acted in a supervisory capacity. "To impose supervisory liability, other misconduct [by the medical defendants] must be very similar to the conduct giving rise to liability." *Livers v. Schenck*, 700 F.3d 340, 356 (8th Cir. 2012). This means that there is no real vicarious liability. *See McDowell*, 990 F.2d at 435. Rather, to be liable under § 1983 the medical defendants had to personally violate Saylor's rights or be responsible for a systematic

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[5] Saylor generally states in his complaint that "Defendants Bakewell, Britten and Houston are equally responsible participants in the Plaintiff's transfer, and any reduction in health care services to the Plaintiff [that] resulted from such transfer." Without any specifics, Saylor claims that the nonmedical defendants "continually exposed [him] to intolerable, horrifying, and medically detrimental conditions while he [was] housed at TSCI since 2010." These indiscriminate grievances are not enough to prove that they knew of, participated in, or implicitly authorized, the mistreatment or nontreatment of Saylor, such as is necessary to maintain a claim of deliberate indifference under the Eighth Amendment.

condition that violates the Constitution. *Livers*, 700 F.3d at 357. Saylor's main argument is that the treatment that occurred after Dr. Christensen left NSP rises to the level of cruel and unusual punishment. Dr. Christensen's treatment plan was three-part: regular psychotherapy treatment, medication, and a safe environment. The medical defendants attempted to provide Saylor with another psychiatrist at NSP, ultimately found him another psychiatrist at TSCI, continued medication as they saw fit within their independent medical judgment, and gave him his requested private cell. To the extent there was any change in Dr. Christensen's treatment plan, Saylor requested some and agreed to other deviations. Specifically, Saylor stated he was willing to forgo seeing a doctor so long as he could continue taking his medications. After the meeting with Dr. Baker wherein she suggested easing him off Seroquel because it did not seem to be helping and was causing low blood pressure, Saylor agreed to continue taking Xanax.

Throughout his time of incarceration, the record shows that Defendants met Saylor's medical needs beyond the minimum standard required. Defendants were aware of his medical needs and took steps to meet those needs. Because Saylor cannot show that Defendants acted with deliberate indifference, there was no deprivation of his Eighth Amendment rights, and thus, Defendants are entitled to qualified immunity.

B. First and Fourteenth Amendment Claims

Defendants claim that the district court erred by failing to fully discuss the denial of summary judgment based on qualified immunity with regard to these claims. "It is 'certain, and the case law is clear, that [the officials] are entitled to a *thorough determination* of their claim[s] of qualified immunity if that immunity is to mean anything at all.'" *Payne*, 749 F.3d at 701 (first and third alteration in original) (emphasis added) (quoting *O'Neil v. City of Iowa City, Iowa*, 496 F.3d 915, 917 (8th Cir. 2007)). A thorough determination discusses all of the claims litigated. Here, the court denied qualified immunity by generally denying Defendants' motion for summary judgment but only analyzed the Eighth Amendment claim. Nonetheless, a review of the facts determined by the district court, as well as those likely assumed, reveals no violation of either the First or Fourteenth Amendment, and thus, we reverse and dismiss these claims as well.

Saylor claims that in retaliation against him for filing the state tort case and in violation of the First Amendment, Defendants (1) terminated Dr. Christensen so that Saylor no longer received adequate psychiatric care, (2) discontinued his medicines, (3) refused to provide him with psychotherapy, (4) transferred him to a new facility, and (5) kept him isolated in Administrative Segregation without review. Similarly, Saylor's Fourteenth Amendment substantive due process claim arises due to his transfer to TSCI and his subsequent confinement in SMU.

In order to succeed on a First Amendment retaliation claim Saylor must show that "(1) he engaged in a protected activity, (2) the government official took adverse action against him that would chill a person of ordinary firmness from continuing in the activity, and (3) the adverse action was motivated at least in part by the exercise of the protected activity." *Revels v. Vincenz*, 382 F.3d 870, 876 (8th Cir. 2004). The *reason* for the government official's action must have been to prevent the plaintiff from engaging in the protected activity. *Id*.

First, "inmates have no constitutional right to receive a particular or requested course of treatment, and prison doctors remain free to exercise their independent medical judgment." *Meuir v. Greene Cty. Jail Emps.*, 487 F.3d 1115, 1118 (8th Cir. 2007) (quoting *Dulany v. Carnahan*, 132 F.3d 1234, 1239 (8th Cir. 1997)). As such, Defendants violated no constitutional right by assigning Saylor to another psychiatrist when Dr. Christensen's contract with NDCS ended or by changing Saylor's medication at the direction of a doctor. Second, "a prisoner enjoys no constitutional right to remain in a particular institution." *Goff v. Burton*, 7 F.3d 734, 737 (8th Cir. 1993) (quoting *Murphy v. Mo. Dep't of Corr.*, 769 F.2d 502, 503 (8th Cir. 1985)). In fact, "prison officials 'may transfer a prisoner for whatever reason or for no reason at all.'" *Id.* (quoting *Olim v. Wakinekona*, 461 U.S. 238, 250 (1983)). However, retaliation against a prisoner cannot be the motivation behind the transfer. *Id.* Here, the clearly stated, nonretaliatory reason for the transfer was to provide Saylor with necessary psychiatric care. He refused to see Dr.

Kamal at NSP, and Dr. Baker was available to work with Saylor at TSCI. Finally, Saylor was kept in Administrative Segregation, specifically SMU, because he requested his own cell due to his PTSD. This is the only area with single prisoner cells. Although he was cleared to be released into Protective Custody, he would have had to share a cell with a roommate, which he refused to do. It is blatantly contradictory to request a private cell with no roommates and then complain about isolation. Because none of Saylor's activities were protected and none of Defendants' actions were retaliatory, Saylor has no First Amendment claim.

"The Fourteenth Amendment's Due Process Clause protects persons against deprivations of life, liberty, or property." *Wilkinson v. Austin*, 545 U.S. 209, 221 (2005). To state a claim under the Due Process Clause, some interest must first be violated. *See Singleton v. Cecil*, 176 F.3d 419, 424 (8th Cir. 1999). "A liberty interest may arise from the Constitution itself, by reason of guarantees implicit in the word 'liberty,' or it may arise from an expectation or interest created by state laws or policies." *Wilkinson*, 545 U.S. at 221. In most cases, substantive due process violations involve "marriage, family, procreation, and the right to bodily integrity." *Singleton*, 176 F.3d at 425 (quoting *Albright v. Oliver*, 510 U.S. 266, 272 (1994)). More generally, the Supreme Court has held that substantive due process "protects those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition,' and 'implicit in the concept of ordered

liberty.' *Id.* (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)).

> In regards to Saylor's transfer from NSP to TSCI:
>
> > the Due Process Clause in and of itself [does not] protect a duly convicted prisoner against transfer from one institution to another within the state prison system. Confinement in any of the State's institutions is within the normal limits or range of custody which the conviction has authorized the State to impose.

Meachum v. Fano, 427 U.S. 215, 225 (1976). Here, Saylor was transferred to a comparable prison for the sole purpose of obtaining psychiatric care. This does not violate the Due Process Clause of the Fourteenth Amendment, and neither does Saylor's confinement in SMU once he arrived at TSCI. Saylor only has a claim under the Fourteenth Amendment if the action by the government officials "impose[d] atypical and significant hardship on [him] in relation to the ordinary incidents of prison life." *Sandin v. Conner*, 515 U.S. 472, 484 (1995). Segregation due to a prisoner's request to be kept in a single prisoner cell because of PTSD is not an atypical or a significant hardship. Rather, TSCI made special accommodations for Saylor. Accordingly, there has been no constitutional violation, and thus, Saylor has no cognizable Fourteenth Amendment claim. Defendants are entitled to qualified immunity on these two issues.

III. CONCLUSION

The judgment of the district court is reversed, and the case is dismissed.

KELLY, Circuit Judge, dissenting.

The district court found that the evidence in this case, viewed in the light most favorable to Saylor, demonstrated a genuine dispute as to the facts relevant to qualified immunity. I agree with the district court that the evidence presented by Saylor, though not dispositive as to the merits of his claim, precludes summary judgment on the basis of qualified immunity.

In Saylor's previous state tort lawsuit, the state court found that the Department of Corrections had negligently failed to provide adequate care for Saylor's PTSD between June 11, 2002, and November 22, 2005. As the district court noted, the defendants presented no evidence suggesting that they were unaware of the prior state court judgment. For the purposes of the summary judgment analysis, there is no genuine dispute that all the defendants were actually aware of Saylor's serious medical needs and the risk of harm if he were denied adequate care. The district court found that Saylor had produced evidence – including his treatment records, his communications with prison staff, records of his transfer and administrative segregation, the affidavit of Dr. Christensen, and his own

affidavit – to support his contention that the Department of Corrections had reverted to providing inadequate medical treatment as they had previously. This evidence, viewed in the light most favorable to Saylor, tends to show that shortly after the judgment in his state tort case, Saylor's treatment by Dr. Christensen was abruptly discontinued; his treatment plan, including his drug therapy, was interrupted; the responsible Department of Corrections officials failed to develop an appropriate alternative treatment plan; prison staff returned to their prior practice of failing to respond or responding inadequately to Saylor's communications; and Saylor was transferred and placed on the most restrictive confinement classification possible, despite that classification's incompatibility with his health needs. The evidence does not establish that Saylor caused or consented to the changes to his treatment, or that Saylor's transfer and placement in the Special Management Unit were necessary and consistent with an adequate treatment plan. Moreover, the district court found that there was sufficient evidence of each defendant's involvement in Saylor's care to establish that they may have been personally aware of or involved in this allegedly unconstitutional treatment.

The district court's factual findings, rather than being "blatantly contradicted by the record," are well supported and reflect careful consideration of the record evidence in the light most favorable to Saylor. *Walton*, 752 F.3d at 1116. Based on these findings, it would be possible to conclude that the defendants "actually

knew of, and [were] deliberately indifferent to or tacitly authorized" constitutionally deficient medical care for Saylor. *McDowell*, 990 F.2d at 435. The facts relevant to qualified immunity are genuinely disputed, precluding summary judgment on this basis. I would therefore affirm the district court's denial of summary judgment as to Saylor's Eighth Amendment deliberate indifference claim.

With regard to Saylor's First and Fourteenth Amendment claims, the district court did not make any factual determinations or conduct the required "thorough determination" of the defendants' entitlement to qualified immunity. *See Payne*, 749 F.3d at 701 (quoting *O'Neil*, 496 F.3d at 918). Without the district court's factual findings, we have no basis for our review of the grant or denial of qualified immunity. Therefore, when the district court fails or refuses to rule on qualified immunity, "our court only exercises its jurisdiction to compel the district court to decide the qualified immunity question." *Id.* I would remand Saylor's First and Fourteenth Amendment claims to the district court for it to properly conduct the qualified immunity analysis.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 14-3889

James Saylor

Plaintiff-Appellee

v.

State of Nebraska

Defendant

Randy Kohl, M.D.; Dennis Bakewell; Robert Houston

Defendants-Appellants

Nebraska Department of Correctional Services;
Natalie Baker, M.D.; Mohammad Kamal, M.D.

Defendants

Cameron White, PhD.; Mark Weilage, PhD.;
Fred Britten; Kari Perez, PhD.

Defendants-Appellants

Correct Care Solutions, LLC.

Defendant

Appeal from U.S. District Court
for the District of Nebraska – Lincoln
(4:12-cv-03115-JFB)

JUDGMENT

Before RILEY, Chief Judge, BEAM and KELLY, Circuit Judges.

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is reversed in accordance with the opinion of this court.

January 29, 2016

Order Entered in Accordance with Opinion:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

JAMES SAYLOR,

Plaintiff,

v.

RANDY KOHL, M.D.; DENNIS BAKEWELL, ROBERT HOUSTON, NATALIE BAKER, M.D.; MOHAMMAD KAMAL, M.D.; CAMERON WHITE, PHD.; MARK WEILAGE, PHD.; FRED BRITTEN, KARI PEREZ, PH.D.; AND CORRECT CARE SOLUTIONS, LLC,

Defendants.

4:12CV3115

MEMORANDUM AND ORDER

(Filed Dec. 22, 2014)

This matter is before the court on a motion for summary judgment filed by defendants Dennis Bakewell, Fred Britten, Robert Houston, Randy Kohl, Kari Perez, Mark Weilage, and Cameron White, in their official and individual capacities, and by Mohammad Kamal, M.D. in his official capacity, having been served only in his official capacity. Filing No. 141.[1] This is an

[1] Also pending are a motion to defer or deny summary judgment, Filing No. 166, a motion to reopen summary judgment, Filing No. 174, and a motion for leave to file a reply brief, Filing No. 175. The plaintiff's motion to defer or deny summary judgment, Filing No. 166, has been rendered moot by this disposition. The magistrate judge granted an earlier motion to reopen that was not opposed by the defendants. Filing No. 170, Order. Defendants have not responded to the most recent motion to reopen. The court

action for violations of constitutional rights filed by an inmate under 42 U.S.C. § 1983. The defendants are Nebraska Department of Correctional Services ("DCS") employees, officials or contractors.[2] This court has jurisdiction under 28 U.S.C. § 1331.

In response to defendants' earlier motion to dismiss, the court found claims against the State of Nebraska and DCS and against individual defendants in their official capacities were barred by sovereign immunity. Filing No. 124, Memorandum and Order at 11-12. The court also dismissed the plaintiff's state law negligence claim. *Id.* The plaintiff's claims for equitable relief against the defendants in their official capacities and his monetary damages claims against the defendants in their individual capacities remain pending.

In his complaint, the plaintiff generally alleges that the defendants were deliberately indifferent to his serious medical needs in failing to properly treat him for Posttraumatic Stress Disorder ("PTSD"). He also alleges the defendants violated his due process rights

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finds the latest motion to reopen should similarly be granted and attached materials deemed filed instanter. (Filing No. 174-1 to 174-11).

The motion for leave to file a reply brief will also be granted and the attached proposed reply brief (Filing No. 174-1) deemed filed instanter. The court has considered the proposed submissions in connection with this motion.

[2] Correct Care Solutions, Inc., ("CCS") contracts with the state to provide psychiatric care to inmates. *See* Filing No. 124, Memorandum and Order at 2.

and retaliated against him by transferring him to Tecumseh State Correctional Institute and reclassifying him. He asserts violations of his First, Eighth, and Fourteenth Amendment rights.[3]

The defendants deny the plaintiff's allegations. Defendants Randy Kohl, M.D., Cameron White, Ph.D., Mark Weilage, Ph.D., Robert Houston, Fred Britten, Dennis Bakewell, Kari Perez, Ph.D., and Mohammad Kamal, M.D., move for summary judgment, arguing they are immune from suit by reason of qualified immunity. They also assert that any claims alleging violations that occurred before June 8, 2008 are barred by the four-year statute of limitations under 42 U.S.C. § 1983. They further argue that the defendants' statement of undisputed facts should be deemed admitted because of the plaintiff's failure to follow the local rules and also contend that they are entitled to summary judgment because the plaintiff "has wholly failed to substantiate any of his allegations with probative evidence, as is required at this stage of the proceedings." *See* Filing No. 173, Reply Brief at 11.

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[3] The plaintiff's allegations are summarized in greater detail in the court's order on the defendant's motion to dismiss. Filing No. 124, Memorandum and Order at 1-5; *see Saylor v. Nebraska*, No. 4:12cv3115, 2013 WL 6036630, *2-3 (D. Neb. Nov. 13, 2013). Some additional relevant facts are set forth in the opinion of the District Court of Lancaster County, Nebraska, in *Saylor v. State of Nebraska*, No. CI 05-1597 (March 31, 2010); Filing No. 143-18, Index of Evid., Ex. 16 (hereinafter, "the State tort action").

I. FACTS

In their brief in support of their motion, defendants set out 162 numbered paragraphs of ostensibly undisputed facts. Filing No. 145, Defendants' Brief at 4-26. In several responses, the plaintiff explicitly controverts over 100 of these supposedly undisputed facts. *See* Filing No. 163, Plaintiff's Brief at 5-10; Filing No. 165-1, Supplemental Response at 1-15; Filing No. 174-1, Proposed Supplemental Response at 1-20. (Specifically, the plaintiff only admits ¶¶ 1-7, 9-14, 17-22, 24-28, 37, 39-41, 43-48, 51-57, 59-63, 65-66, 68-78, 120-128, 150-152, 154-55, and 158-59). For the most part, the agreed-upon facts are either irrelevant or only marginally relevant and not dispositive of the issues before the court.

The defendants also submit their affidavits and other documentary evidence in support of the motion. Filing No. 143, Index of Evid., Exs. 1-16. The evidence includes DCS records relating to Saylor's transfer and reclassification, correspondence to and from Saylor (a/k/a "kites"), minutes of an August 5, 2010, multidisciplinary meeting regarding Saylor, Saylor's medical records, and the order in Saylor's state tort action. *Id.*, Exs. 8-16; *see supra* at 2 n.3.

That evidence shows that defendant Randy Kohl, M.D., is a board-eligible family physician and is the DCS medical director. Filing No. 143-1, Index of Evid., Ex. 1, Affidavit of Randy Kohl. Dr. Kohl directs and coordinates diagnostic and therapeutic services to improve and maintain the health of inmates within DCS

and oversees all health care within DCS. *Id.* at 2. He states he is familiar with the facts of this case and has reviewed the medical records of treatment provided to Saylor. *Id.* DCS records show that Saylor was transferred to Tecumseh State Correctional Institution on September 14, 2010. He states that Saylor's mental health treatment needs were discussed by a team of professionals at a multidisciplinary meeting on August 5, 2010. *Id.* at 3. Dr. Kohl states that the rationale for Saylor's transfer was his need for continuity of care, as Dr. Christensen's contract with NDCS had ended and Saylor refused to work with Dr. Kamal who was the only psychiatrist for the Nebraska State Penitentiary. *Id.* The team determined that placement at Tecumseh would provide Saylor with a stable psychiatric provider – Dr. Natalie Baker, a psychiatrist employed by CCS. *Id.* at 3. He further states that, in his opinion, to a reasonable degree of medical certainty, there was no departure by DCS or CCS medical or psychiatric staff from generally recognized standards of care in any respect. *Id.* at 5.

Defendant Cameron White, Ph.D., states in his affidavit that he has been the Behavioral Health Administrator for DCS since 2004. Filing No. 143-2, Index of Evid., Ex. 2, Affidavit of Cameron White, Ph.D., at 1. Dr. White coordinates the DCS's mental health, substance abuse, social work, sex offender, and psychiatry services to ensure that DCS meets required community standards for behavioral health treatment. *Id.* at 1. He was not personally involved in Saylor's treatment but is familiar with his case. *Id.* at 2-3. He states

that Saylor's mental health records indicate that Saylor was diagnosed with Post-Traumatic Stress Disorder ("PTSD") in 2005 by Dr. Glenn Christensen. *Id.* at 2. Dr. Christensen's contract with DCS ended on May 8, 2010. *Id.* He states that the rationale for Saylor's transfer was to ensure consistency of psychiatric services, which could only occur at Tecumseh at that time, due to changes in psychiatric staffing at the Nebraska State Penitentiary ("NSP"). *Id.* at 3. He also states that "[a]t no time was mental health care withheld, nor was Inmate Saylor ever improperly treated for any of his mental health conditions." *Id.* Further, he opines

> to a reasonable degree of psychological certainty that the care offered and provided to inmate Saylor by the mental health staff at NSP and TSCI was at all times in compliance with the generally recognized standards of applicable care in Lincoln and Tecumseh Nebraska, or similar communities for mental health providers who attend to patients under circumstances the same as, or similar to, those in the case of inmate Saylor.

Id.

In his affidavit, Mark Weilage, Ph.D., states that he is the assistant behavioral health administrator for mental health for DCS and has been since December 2005. Filing No. 143-3, Ex. 3. He attests to the accuracy of Saylor's mental health records. *Id.* at 2. Dr. Weilage is a clinical psychologist and states that he is familiar with Saylor's case and had contact with Saylor while Saylor was incarcerated at the NSP to assess him for

anxiety and to determine treatment interventions, as appropriate. *Id.* at 2. He also states that he was present at the multidisciplinary team meeting held on August 5, 2010, at which Saylor's mental health needs were discussed and his transfer to Tecumseh was considered. *Id.* at 3. He also states that the rationale for the transfer was to ensure consistency of psychiatric services. *Id.* Further, Dr. Weilage states that he conducted approximately half a dozen routine follow-ups with Saylor when he was housed at Tecumseh. *Id.* He also states the opinion that

> Based upon [his] personal knowledge of the facts in this case, upon [his] review of the patient's mental health records, and upon [his] experience and training, it is [his] opinion to a reasonable degree of psychological certainty that the care offered and provided to inmate Saylor by the Mental Health staff at NSP and TSCI was at all times in compliance with the generally recognized standards of applicable care in Lincoln and Tecumseh Nebraska, or similar communities for mental health providers who attend to patients under circumstances the same as, or similar to, those in the case of Inmate Saylor.

Id. at 4.

Defendants also submit the affidavit of Robert Houston, former director of DCS, who is now retired. Filing No. 143-4, Index of Evid., Ex. 4, Affidavit of Robert Houston at 1. As the director of DCS, he had authority over the administration of the DCS its staff and

inmates. *Id.* at 2. He states it is the policy of DCS that inmates be provided unimpeded access to health care services. *Id.* He relates that NSP has been accredited by the American Correctional Association ("ACA") since 1981 and the Tecumseh Correctional Institution has been accredited since 2003. *Id.* at 2. He also sets out certain ACA standards for mental health care. *Id.* at 3. He states that he was "in no way personally involved in inmate Saylor's medical or mental health care." *Id.* at 3.

Fred Britten, who was employed as Warden of Tecumseh for DCS from July 2000 to April 2013, states in his affidavit that as part of his duties, he operated a large prison that housed all classifications of inmates other than those who were community-based. Filing No. 143-5, Index of Evid., Ex. 5, Affidavit of Fred Britten at 1. *Id.* He oversaw the administration of personnel and programs to ensure a safe, efficient lawfully functioning prison. *Id.* at 2. He states he was familiar with the facts of the case and has reviewed records regarding Saylor's classification and custody levels while at Tecumseh. *Id.* He states that his only involvement with the case was regularly attending institutional classification committee meetings regarding Saylor. *Id.* The institutional classification committee reviews all classification recommendations to the Warden. *Id.* at 2. He states that the majority of institutional classification committee hearings regarding Saylor were held for segregation status reviews or to consider reclassification while he was in the Special Management Unit ("SMU") at Tecumseh. *Id.* at 3. Further, he states that

" 'administrative segregation' is an umbrella term used to describe the removal of an inmate from general population for an indefinite period of time to maintain order and security within the institution." *Id.* He states that administrative segregation is not disciplinary segregation – it includes administrative confinement, intensive management, protective custody, and transition confinement. *Id.* at 4. He also states that inmates are given notice of segregation status review and have an opportunity to appear before the unit classification committee. *Id.*

Warden Britten also states that on September 14, 2010, when Saylor was transferred to Tecumseh from NSP, Saylor was initially supposed to be placed in protective custody as per his request. *Id.* at 5. However, Saylor was immediately placed in the hospital on arrival due to an attempt to hang himself. *Id.* Britten also states that all inmates in the SMU are in single cells. *Id.* On September 20, 2010, Saylor was placed on immediate segregation in the SMU for refusing to move to the Protective Custody Unit. *Id.* Britten states "immediate segregation" is "the immediate confinement of an inmate to protect staff, other inmates, the inmate being confined, or to maintain the security management and control of the institution pending a classification or disciplinary action and/or investigation." *Id.* On September 28, 2010, the unit classification committee held a hearing and recommended that the institutional classification committee place inmate Saylor on administrative confinement. *Id.* at 6. He explains that "being placed on a ministry of [sic] confinement would allow

inmate Saylor to be housed on the special management unit, which only allows one inmate per cell, which seemed appropriate, given inmate Saylor's fears of other inmates." *Id.* Britten approved placing Saylor on administrative confinement on September 30, 2010, based on the Unit Classification Committee's reasoning. *Id.* at 6. On October 14, 2010, the institutional classification committee and Britten approved removing Saylor from administrative confinement and placing him in protective custody, where he could be housed with another inmate. *Id.* at 7. On October 28, 2010, Saylor was again placed on immediate segregation and housed in the SMU because he stated he feared for his safety in protective custody. *Id.* On November 10, 2010, the institutional classification committee and Britten approved placing inmate Saylor on administrative confinement, where he remained housed in the SMU for the remainder of his time at Tecumseh. *Id.* at 7. Warden Britten also states that "at no time was he personally involved in Saylor's medical or mental health care." *Id.* at 8. Warden Britten authenticated the documents and copies of documents marked as Exhibit 8. *Id.*; *see* Filing No. 143-8, Index of Evid., Ex. 8, inmate reclassification forms and segregation status forms.

Dennis Bakewell, the Warden of NSP from May 2006 until September 2011 and Warden of the Diagnostic and Evaluation Center D & E from September 2011 until April 2013, testified by affidavit that he too is familiar with the facts of the case. Filing No. 143-6, Index of Evid., Ex. 6, Affidavit of Dennis Bakewell at

1-2. He states that his only personal involvement with the case dealt with the transfer of Saylor from NSP to Tecumseh on September 14, 2010. *Id.* at 1. He states that inmates who need mental health care beyond the resources available in their facility, as determined by the responsible physician, are transferred under appropriate security provisions to a facility where such care is available. *Id.* at 3. He states that he attended the institutional classification committee hearing and reviewed documents regarding Saylor's mental health treatment needs. *Id.* He recalls reviewing a document provided by DCS mental health staff that indicated that Saylor refused to work with DCS psychiatrist, Dr. Mohammed Kamal who was the only psychiatrist available at NSP at the time. *Id.* He, too, testified that the rationale for transferring Saylor was to ensure consistency of psychiatric services. *Id.* Warden Bakewell testified that he had the authority to make the final decision at the institutional level regarding Saylor's transfer from NSP to Tecumseh. *Id.* at 4. He also states that an inter-institution transfer is not a reclassification action. *Id.* Saylor maintained his same custody level and administrative segregation status when he was transferred from NSP to Tecumseh. *Id.* Like the other correctional officials, Bakewell states that "at no time was he ever personally involved in Saylor's medical or mental health care." *Id.* Bakewell also authenticates the documents in Exs. 9 and 10. *Id.* at 4; *see* Filing No. 143, Index of Evid., Ex. 9, inmate transfer order, & Ex. 10, inmate reclassification.

In her affidavit, Kari Perez, Ph.D., states that she was a clinical psychologist supervisor at NSP from September 2005 until March 2012. Filing No. 143-7, Index of Evid., Ex. 7, Affidavit of Kari Perez, Ph.D. As clinical psychologist supervisor, Dr. Perez supervises mental health services at NSP, including supervising the clinical activities of mental health practitioners. *Id.* She provided assessments and psychological evaluations of inmates and assisted in the development and quality assurance of mental health treatment programs. *Id.* She states that she is familiar with the facts of the case and her involvement in the case was supervising the license mental health practitioners who worked with Saylor. *Id.* She states she would consult with the licensed mental health practitioners and sign off on the segregation mental status reviews and other forms regarding Saylor. *Id.* She further states that she also attended many of Saylor's institutional classification committee hearings while he was incarcerated at NSP. *Id.* She states, however, that she did not directly treat or work with inmate Saylor, with the exception of meeting with him one time to address difficulties that one of the licensed mental health practitioners was having treating him. *Id.* at 2. Further, she states she was involved in the August 5, 2010, multidisciplinary team meeting where Saylor's mental health treatment needs were discussed and his transfer to Tecumseh was considered. *Id.* She further states the rationale for transferring Saylor was to ensure consistency of psychiatric services. *Id.* She authenticates the minutes of the August 5, 2010 meeting. *Id.* at 3; *see* Filing No. 143-11, Index of Evid., Ex. 11, Meeting Minutes. The

meeting minutes show that Dr. Kamal was also at the meeting. *Id.*, Ex. 11, Meeting Minutes at 1.

Dr. Perez also states that all mental health staff under her supervision who treated Saylor acted properly with in the standards of the medical community. *Id.* at 3. She states Saylor received consistent and appropriate psychological treatment from the licensed mental health practitioners under her supervision. *Id.* She further opines, to a reasonable degree of psychological certainty, that

> the care provided by the NSP psychological and mental health staff were at all times during inmate Saylor's care in compliance with the generally recognized standards of applicable care in Lincoln, Nebraska, or similar communities for hospitals who attend to patients under circumstances the same as or similar to, those in the case of inmate Saylor.

Id. at 3.

Other documentary evidence submitted in support of the defendants' motion shows that Lancaster County, Nebraska, District Court (hereinafter, "the state court") found in March 2010 that from June 2002 to November 2005 Saylor had not been provided with necessary treatment for PTSD in a timely fashion. Filing No. 143-18, Index of Evid., Ex. 16, state tort action Order at 35. The state court found, however, that the treatment provided to Saylor between November 2005 and the date of the trial in early 2010 complied with the applicable community standard of care for PTSD.

Id. That treatment plan included seeing a therapist for cognitive behavioral treatment at least every other week and seeing a psychiatrist every 2 to 3 months, plus medication including an SSRI and a benzodiazepine and EDMR therapy. *Id.* at 24-26. The court further found that DCS's responses to Saylor's "kites" and 90-day mental health reviews did not satisfy Dr. Kamal's earlier recommendation that Saylor be "closely and regularly" monitored. *Id.* at 34. The court was persuaded that PTSD is a very complicated and serious condition that requires more than passing treatment or therapy and credited Saylor's testimony that his flashbacks, which started in 2000, became worse over the years. *Id.* at 34-35. It found the flashbacks interfered with his thinking and caused physical pain.[4] *Id.* at 37-38. Saylor was awarded $250,000 in damages in the action. *Id.* at 38.

In opposition to the defendant's motion, the plaintiff submits his own affidavits and the affidavit of Glenn Christensen, M.D. *See* Filing No. 162-1, Ex. A, Affidavit of James Saylor ("Saylor Aff. I"); Filing No. 167-1, Index of Evid., Ex. A, ("Saylor Aff. II"); Filing No.

[4] Specifically, it credited his testimony that he only sleeps 3 or 4 hours a night and has a fear of being placed in a cell with another inmate. *Id.* at 37. He suffers from erectile dysfunction, phantom rectal pain, and is very anxious and describes himself as suffering from a panic disorder. *Id.* Further, the court found that prior to the assault, Saylor held the job; since the assault, due to being placed in protective custody, he has not had a job. *Id.* Since the assault, Saylor has not spent time in the yard and has not interacted with other inmates. *Id.* He fears being around other inmates. *Id.* He is only allowed out of his cell 1 hour per day. *Id.*

174-3, Supplemental Index of Evid., Ex. D, Affidavit of Glenn Christensen, M.D. ("Dr. Christensen Aff."). Saylor also submits certain administrative regulations and evidence submitted in his state tort case. *See* Filing No. 174-2, Supplemental Index of Evid., Exs. E to L.

In his affidavit, the defendant makes several salient assertions. He states that he has suffered from PTSD since 2002, as a result of being sexually assaulted by several inmates while an inmate at LCC, a DCS facility. Filing No. 162-1, Saylor Aff. I at 1-2. As a result, he repeatedly experiences headaches, flashbacks, extreme fear, anxiety, panic attacks, insomnia, nightmares, fatigue, inability to concentrate, and is incapable of sharing a cell with any other inmates. *Id.* at 2. Further, he states that Defendants Dr. Kohl, Dr. White, Dr. Weilage, Dr. Kamal, Dr. Perez, Dr. Baker, Warden Bakewell, and Warden Britten have indicated to him that they are aware that he suffers from PTSD and he states that they were "specifically and directly made aware" of his health care needs by virtue of the decision of the state tort action. *Id.* at 3. He was initially diagnosed with PTSD in 2005 and was treated by Dr. Glenn Christensen from the time of his diagnosis until April 2010. *Id.* He understood Dr. Christensen's treatment plan had three parts – regular psychotherapy, the prescription medications Seroquel and Klonopin, and a safe, stable routine. *Id.*

He asserts that shortly after the March 31, 2010, decision in his state tort case the defendants "returned to the indifferent pattern of behavior he had endured

prior to November 2005." *Id.* He states that on April 21, 2010, Dr. Christensen told him he would no longer be receiving psychiatric care from Dr. Christensen because DCS had terminated its service contract. *Id.* at 5. Further, he states that he repeatedly asked for medical/health care from the defendants after March 31, 2010, but they have repeatedly refused to provide him with adequate care. *Id.* He states he requested care both in person, and through "kites."[5] *Id.* Saylor further states that the treatment plan for his PTSD devised by Dr. Christensen has been discontinued and interrupted. *Id.* Although he has been promised alternative treatment, he has been provided no such treatment and no such treatment plan has been developed. *Id.* Further, he states the medications prescribed for him by Dr. Christensen have been interrupted at various times, discontinued at various times, and administered improperly or erratically. *Id.* He also contends that the "safe environment" Dr. Christensen devised as part of his treatment has been destroyed. *Id.*

With respect to the individual defendants, he asserts that since March 31, 2010, Dr. Kohl has failed to properly supervise and train Dr. Baker, Dr. Kamal, Dr. White, Dr. Weilage, Dr. Perez and CCS. *Id. at 6.* He states that Doctors Baker, Kamal, White, Weilage, Perez and CCS have all failed to provide him with a plan of treatment, psychotherapy and medications, and appropriate conditions of confinement. *Id.* He states that

[5] The evidence submitted by the defendants substantiates that testimony. *See* Filing No. 143-12, Index of Evid., Ex. 12, responses to inmate interview requests.

Dr. Baker also reduced, changed and rescheduled his medications. *Id.* He contends Dr. White participated in the termination of Dr. Christensen, refused to allow him to privately employ Dr. Christensen, and also failed to properly evaluate health care needs and to establish a suitable treatment plan. *Id.* He contends that Dr. Weilage also failed to properly evaluate his health care needs, and reneged on a personal promise made in the summer of 2010 to establish a treatment plan similar to Dr. Christensen's plan. *Id.* He also states that Dr. Perez has failed to properly supervise and train Dr. White, Dr. Weilage, and CCS and contends Correct Care similarly failed to supervise its employees as to the appropriate and proper administration of medications and the appropriate responses to erratic changes in medications. Saylor's claims of inappropriate or deficient care are supported by Dr. Christensen's opinion, medical evidence in the record and the state court order. *See* Filing No. 174-3, Index of Evid., Ex. D, Dr. Christensen Aff. at 3; Filing No. 143-13 to 143-17, Index of Evid., Exs. 12 to 15, Saylor's psychiatric records, mental health records, and mental health communications.

Saylor also states in his affidavit that on September 14, 2010, defendants took steps to transfer him to Tecumseh. *Id.* at 7. He states the transfer was physically and mentally traumatic and stressful. *Id.* He contends his PTSD became worse as a result of the transfer and he suffered other physical injuries that required medical attention at the time. *Id.* Further, he states that, in his experience, his transfer to Tecumseh

was not typical and was accomplished without notice, and resulted in, or was simultaneous with reclassification. *Id.*

Significantly, he contends he was housed in the Tecumseh SMU from October 2010 until early this year. *Id.* at 8. While housed at SMU, he had strict limitations on movement, limited access to visitors, and limited access to his property, including legal materials. *Id.* His privacy was also limited. *Id.* He states in his affidavit that he has "been held in administrative segregation since September of 2010 and have not been allowed meaningful review or hearing with regard to my classification or placement in segregation." *Id.* He states he was kept indefinitely on administrative segregation because of his PTSD. *Id* . He also details his efforts to obtain medical care and presents a timeline of events. *Id.* at 4-9.

In his affidavit, Dr. Christensen states that his opinion, to a reasonable degree of medical certainty, is that the failure to provide Mr. Saylor with monthly psychiatric consultations after Dr. Christensen's final session with him in April 2010 was detrimental to Saylor's condition and fell below the prevailing standard of care. Filing No. 174-3, Index of Evid., Ex. D, Dr. Christensen Aff. at 3. Similarly, discontinuation of Seroquel of Saylor, without first conducting further testing and in the manner in which it was discontinued, was also harmful to Saylor and fell below the prevailing standard of care. *Id.* Likewise, transferring Saylor to the Tecumseh State Correctional Institution and keeping him in the SMU for more than three years

was harmful to Saylor and likely exacerbated the symptoms of PTSD, particularly because he was left in extreme isolation. *Id.*

Dr. Christensen also states that Dr. Kohl terminated his contract to provide psychiatric services with DCS less than a month before his final session with Saylor and did not afford Dr. Christensen the opportunity to introduce Saylor to a new psychiatrist or otherwise help Saylor make a smooth transition of care to a new psychiatrist. *Id.* at 2. Dr. Christensen also states that as of April 21, 2010, there were psychiatrists other than Dr. Kamal who provided psychiatric care to DCS inmates in Lincoln facilities. *Id.*

Saylor also submits copies of administrative regulations as well as documents including operational memoranda on inmates' access to health care, and certain reclassification forms that were obtained in discovery in the state tort case. *See* Filing No. 174, Index of Evid., Exs. E to L.

The plaintiff has also submitted supplementary materials indicating that the records supplied by the state defendants are incomplete and therefore misleading and also offers a summary of incomplete documents. Filing No. 176-1, Affidavit of Terry Barber; Filing No. 176-3, Summary. Further, in controverting many of the defendants' ostensibly undisputed facts, the plaintiff has pointed out inconsistencies in the defendants' submissions. *See* Filing No. 176, Supplemental Response

II. LAW

A government official sued under § 1983 is entitled to qualified immunity unless the official violated a statutory or constitutional right that was clearly established at the time of the challenged conduct. *Carroll v. Carman*, 135 S. Ct. 348, 350 (2014); *see Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2080 (2011); *Baribeau v. City of Minneapolis*, 596 F.3d 465, 474 (8th Cir. 2010); *Wilson v. Lawrence County*, 260 F.3d 946, 951 (8th Cir. 2001). A court is permitted to exercise sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand. *Meehan v. Thompson*, 763 F.3d 936, 940 (8th Cir. 2014). District courts must make reasoned "findings of fact and conclusions of law" sufficient to permit meaningful appellate review of the qualified immunity decision. *Walton v. Dawson*, 752 F.3d 1109, 1116 (8th Cir. 2014).

"A right is clearly established only if its contours are sufficiently clear that 'a reasonable official would understand that what he is doing violates that right.'" *Carroll*, 135 S. Ct. at 350 (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). "In other words, 'existing precedent must have placed the statutory or constitutional question beyond debate.'" *Carroll*, 135 S. Ct. at 350 (quoting *al-Kidd*, 131 S. Ct., at 2083). This doctrine gives government officials breathing room to make reasonable but mistaken judgments, and protects all but the plainly incompetent or those who knowingly violate the law. *Carroll*, 135 S. Ct. at 350.

The officers' defense of qualified immunity is evaluated "from the perspective of a reasonable police officer based on facts available to the officer at the time of the alleged constitutional violation." *Gladden v. Richbourg*, 759 F.3d 960, 964 (8th Cir. 2014). "If, based on those facts, the officer reasonably failed to comprehend that he was violating a person's clearly established constitutional rights, he is entitled to qualified immunity from suit." *Id.* A plaintiff "must show that 'every reasonable official would have understood that what he is doing violates' a constitutional right" and "that the constitutional question was 'beyond debate.'" *Blazek v. Iowa City*, 761 F.3d 920, 924 (8th Cir. 2014) (quoting *Ashcroft v. al-Kidd*, ___ U.S. ___, 131 S. Ct. 2074, 2083 (2011) (internal quotation omitted)). Courts "must not 'define clearly established law at a high level of generality, since doing so avoids the crucial question whether the official acted reasonably in the particular circumstances that he or she faced.'" *Blazek*, 761 F.3d at 924 (quoting *Plumhoff v. Rickard*, ___U.S. ___, 134 S. Ct. 2012, 2023 (2014) (internal quotation and citation omitted)). Nevertheless, the plaintiff "need not show that the 'very action in question has previously been held unlawful' to overcome qualified immunity, as long as the unlawfulness was apparent in light of preexisting law." *Blazek*, 761 F.3d at 926; *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

When summary judgment is sought on a defense of qualified immunity, the court inquires whether the party opposing the motion has raised any triable issue barring summary adjudication. *Ortiz v. Jordan*, 131

S. Ct. 884, 889 (2011). A successful claim of qualified immunity will generally "present 'purely legal' issues capable of resolution 'with reference only to undisputed facts.'" *Ortiz*, 131 S. Ct. at 892 (noting that "[c]ases fitting that bill typically involve contests not about what occurred, or why an action was taken or omitted, but disputes about the substance and clarity of pre-existing law"); *Pearson v. Callahan*, 555 U.S. 223, 237 (2009) (noting that the qualified immunity procedure is of little use in fact-bound cases). "Whether a given set of facts entitles the official to summary judgment on qualified immunity grounds is a question of law," however, "if there is a genuine dispute concerning predicate facts material to the qualified immunity issue, there can be no summary judgment." *Turney v. Waterbury*, 375 F.3d 756, 759-760 (8th Cir. 2004) (quotations omitted); *see Iqbal*, 556 U.S. at 674 (noting that "determining whether there is a genuine issue of material fact at summary judgment is a question of law, but it is a legal question that sits near the law-fact divide").

An inmate "has a well-established right not to have known, objectively serious medical needs disregarded." *Fourte v. Faulkner County, Ark.*, 746 F.3d 384, 387 (8th Cir. 2014); *Estelle v. Gamble*, 429 U.S. 97, 104-06 (1976); *Gregoire v. Class*, 236 F.3d 413, 417 (8th Cir. 2000) ("It is well established that the prohibition on cruel and unusual punishment extends to protect prisoners from deliberate indifference to serious medical needs.") In order to support an Eighth Amendment claim for relief, plaintiff must show that defendants

were deliberately indifferent, that is, that they knew of, and yet disregarded, an excessive risk of harm to plaintiff's health and safety. *Farmer v. Brennan*, 511 U.S. 825, 827 (1994). This principle also extends to an inmate's mental health-care needs. *See Steele v. Shah*, 87 F.3d 1266, 1270 (8th Cir. 1996) (noting psychiatric needs can constitute serious medical needs and that the quality of psychiatric care one receives can be so substantial a deviation from accepted standards as to evidence deliberate indifference to those serious psychiatric needs); *White v. Farrier*, 849 F.2d 322, 325 (8th Cir. 1988).

"Applying the deliberate indifference standard is a 'factually-intensive inquiry.'" *Scott v. Benson*, 742 F.3d 335, 339 (8th Cir. 2014) (quoting *Meuir v. Greene Cnty. Jail Emps.*, 487 F.3d 1115, 1118-19 (8th Cir. 2007)). Whether an official was deliberately indifferent requires both an objective and a subjective analysis. *Jackson v. Buckman*, 756 F.3d 1060, 1065 (8th Cir. 2014); *Scott*, 742 F.3d at 339-40.

Under the objective prong, a plaintiff must establish that he suffered from an objectively serious medical need. *See Scott*, 742 F.3d at 340. To be objectively serious, a medical need must have been "diagnosed by a physician as requiring treatment" or must be "so obvious that even a layperson would easily recognize the necessity for a doctor's attention." *Id.* (quoting *Coleman v. Rahija*, 114 F.3d 778, 784 (8th Cir. 1997)). Under the subjective prong, the plaintiff must show that an official "actually knew of but deliberately disregarded his serious medical need." *Id.* This showing

requires a mental state "akin to criminal recklessness." *Scott*, 742 F.3d at 340 (quoting *Gordon v. Frank*, 454 F.3d 858, 862 (8th Cir. 2006)).

As a result, the plaintiff " 'must clear a substantial evidentiary threshold to show that [the defendants] deliberately disregarded [the plaintiff's] needs by administering an inadequate treatment.' " *Scott*, 742 F.3d at 340 (quoting *Meuir*, 487 F.3d at 1118). "Deliberate indifference is 'more than negligence, more even than gross negligence, and mere disagreement with treatment decisions does not rise to the level of a constitutional violation.' " *Fourte*, 746 F.3d at 387 (8th Cir. 2014) (quoting *Jolly v. Knudsen*, 205 F.3d 1094, 1096 (8th Cir. 2000)); *see Scott* 742 F.3d at 340. Merely demonstrating that a prison doctor committed medical malpractice is insufficient to establish deliberate indifference. *Jackson*, 756 F.3d at 1065-66; *Estelle*, 429 U.S. at 106. "An inmate must demonstrate that a prison doctor's actions were 'so inappropriate as to evidence intentional maltreatment or a refusal to provide essential care.' " *Jackson*, 756 F.3d at 1066 (quoting *Dulany v. Carnahan*, 132 F.3d 1234, 1240-41 (8th Cir. 1997)).

A supervisor may be held individually liable under § 1983 "if a failure to properly supervise and train the offending employee caused a deprivation of constitutional rights." *Laganiere v. County of Olmsted*, No. 14-1088, 2014 WL 6610363, at *2 (8th Cir. Nov. 24, 2014) (quoting *Wever v. Lincoln Cnty.*, 388 F.3d 601, 606 (8th Cir. 2004)). Because there is no vicarious liability under Section 1983, supervisory defendants are liable only if they personally do something that violates an

inmate's rights or if they are responsible for a systematic condition that violates the Constitution, or for a failure to intervene. *Livers v. Schenck*, 700 F.3d 340, 357 (8th Cir. 2012).

The statute of limitations for 42 U.S.C. § 1983 actions is governed by the limitations period for personal injury cases in the state in which the cause of action arose. *Wallace v. Kato*, 549 U.S. 384, 387 (2007). In Nebraska, § 1983 actions are limited by the four-year statute of limitations. Neb. Rev. Stat. § 25-207; *see Montin v. Estate of Johnson*, 636 F.3d 409, 412-13 (8th Cir. 2011). Although state law establishes the statute of limitations for § 1983 actions, federal law controls on the issue of when the statute of limitations begins to run. *Wallace*, 549 U.S. at 388; *Montin*, 636 F.3d at 413. The standard rule is that accrual occurs when the plaintiff has a complete and present cause of action, that is, when the plaintiff can file suit and obtain relief. *Wallace*, 549 U.S. at 388. Under that rule, the tort cause of action accrues, and the statute of limitations commences to run, when the plaintiff knew or should have known of the injury that forms the basis of the claim. *Id.* at 391. Accrual can be delayed under the continuing violations theory. *Zotos v. Lindbergh Sch. Dist.*, 121 F.3d 356, 362 (8th Cir. 1997). A continuing violation does not excuse a plaintiff from complying with the applicable statute of limitations – it simply allows the plaintiff to include, in an initial complaint, allegedly unconstitutional acts that occurred before the limitations period, provided that at least one of the acts complained of falls within the limitations period. *Id.*

III. DISCUSSION

The court finds the evidence, viewed in the light most favorable to the plaintiff, demonstrates that there are genuine issues of material fact on whether the defendants were deliberately indifferent to his serious medical needs so as to violate the Eighth Amendment. There are genuine disputes concerning the predicate facts material to the qualified immunity issue that make summary disposition inappropriate.

The constitutional right at issue arises under the Eighth Amendment. Denial of medical care that results in unnecessary suffering in prison is inconsistent with contemporary standards of decency and gives rise to a cause of action under 42 U.S.C. § 1983. The duty imposed on government officials to provide medical care to prisoners under the Eighth Amendment has been firmly established since 1976. The Eighth Circuit ruled as early as 1988 that psychological disorders may constitute a serious medical need.[6] Consequently, the right to be free of deliberate indifference to serious medical needs, including mental health needs, was clearly established at the time of the challenged conduct by the defendants. Existing caselaw that would have put a reasonable correctional officer on notice that failing to appropriately treat PTSD resulting from a prison sexual assault would pose a risk of harm to an inmate and that ignoring that risk could amount to deliberate indifference to serious medical needs.

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[6] *White v. Farrier*, 849 F.2d at 325.

There is evidence, if credited, that tends to show that plaintiff had an objectively serious medical need and that the defendants were subjectively aware of the plaintiff's condition. The plaintiff has shown that the defendants were aware of facts that would lead to the inference that there was a substantial risk that the plaintiff would be harmed by failing to properly treat his PTSD. The record shows the plaintiff repeatedly asked for more or different mental health treatment. Evidence indicates the defendants were aware of the plaintiff's PTSD diagnosis. The plaintiff's mental health care had been the subject of a state court action challenging the adequacy of mental health treatment afforded to plaintiff by the defendants. The state court found the Department of Corrections had been negligent in failing to provide the plaintiff with appropriate health care after his May 2002 sexual assault. Significantly, none of the defendants stated in their affidavits that they were not aware of the state court judgment. By virtue of the state court judgment, the defendants had actual notice of the risk of harm or injury to this plaintiff as a result of defendants' earlier provision of inadequate care. Evidence of that risk was adduced at the state court trial and defendants Kamal, Perez and Kohl actively participated in the trial. Although the standard for negligence liability is not the same as the standard for deliberate indifference, there is evidence from which a jury could infer that the risk of harm was so "obvious" that ignoring it could amount to deliberate indifference.

There is no dispute that the plaintiff was placed in administrative segregation from October or November 2010 until early 2014. The placement closely followed the state court judgment. The psychiatrist who had been found to have treated him appropriately was terminated shortly after the state court judgment. There is evidence to support the plaintiff's contention that the defendants returned to the inadequate mental health practices that predated 2005 and that had been found wanting by the state court. The plaintiff has adduced evidence that the prison officials and medical personnel denied, delayed, and interfered with his medication regime. Evidence also shows that the defendants also returned to the practice of not responding or inadequately responding to the plaintiff's kites.

There is evidence of personal involvement by all of the defendants in the allegedly unconstitutional conduct. Dr. Kohl participated in Dr. Christensen's termination. Dr. White attended the meeting that resulted in Saylor's transfer to Tecumseh and approved the decision. Dr. Weilage was also present at the meeting and he personally treated Saylor. The record shows Dr. Kamal also attended the meeting. Dr. Perez supervised clinical activities and testified at trial in 2010. She also signed off on segregation status reviews. Warden Britten attended institutional classification meetings and approved administrative segregation for Saylor. Warden Bakewell was involved in the transfer and had authority to make the final decision on the transfer. Former Director Houston may not have personally

participated in Saylor's medical treatment, but was responsible for prison policies and procedures and would have been aware of the specifics of Saylor's case from the state court action.

The claims against the individual defendants are not premised on vicarious liability, but on each defendant's personal knowledge of, and involvement in, unconstitutional acts. There are factual disputes concerning the level of the supervisors' knowledge of the pattern of allegedly unconstitutional acts. The plaintiff alleges, and has produced evidence that tends to show, that the supervisory defendants were aware of their subordinates' failure to properly devise and provide appropriate PTSD treatment, failure to properly dispense medication, or failure to provide appropriate conditions of confinement, and knew this failure posed a substantial risk of harm to the plaintiff. The state court findings provide evidence from which a jury could infer that the defendants had subjective knowledge of the plaintiff's condition and medical needs.

Resolution of the qualified immunity issue requires assessments of credibility that are not appropriate at this stage of the litigation. There are disputes with respect to whether the defendants appreciated the seriousness of the plaintiff's condition or recognized the extent of the risk of harm to the plaintiff. A jury crediting Saylor's evidence could find that the Director and Wardens actually knew that correctional officers had reverted to the conduct that the State court had found deficient and accordingly were on notice of

the constitutional risk. Although the evidence indicates that the defendants were aware of the findings of the state court, issues remain as to whether they had a subjective appreciation that failure to adhere to the medical treatment plan devised by Dr. Christensen would give rise to a serious medical need. There is some evidence that the defendants knew, by virtue of the findings in the state tort action, that the circumstances of the plaintiff's isolation would exacerbate his condition. The state court judgment put the defendants on notice of the parameters of appropriate community care. Defendants' own evidence establishes that the DCS policy is to provide comprehensive health care services by qualified personnel to protect the health and well-being of the inmates.

There is also evidence that supervisory officials tacitly authorized the conduct of subordinates in failing to properly treat the plaintiff, transferring him to Tecumseh and placing him in isolation. There is evidence from which a jury could infer that the supervisors' response to that knowledge was so inadequate as to show deliberate indifference to or tacit authorization of the alleged offensive practices. The evidence shows a long-standing pattern of conduct that involved, at various times, medication mix-ups, treatment delays, inadequate responses to kites, arguably punitive transfers and lengthy segregation of the plaintiff. Supervisory defendants failed to respond in the face of numerous complaints by the plaintiff. The supervisors' continued inaction in the face of documented complaints could amount to evidence from

which a jury could find deliberate indifference. The supervisors were aware that the plaintiff had been in isolation for extended periods of time. They were aware that the state court found the defendants had failed to closely and regularly monitor Saylor's condition.

This is not a case that involves a mere difference of opinion between the lay wishes of the inmate/patient and the professional diagnosis of the prison physician – there are conflicting expert opinions in the record with respect to the adequacy of care provided to the plaintiff. Though a difference of opinion between doctors on the adequacy of a treatment plan may not be conclusive, it illustrates the level of dispute over the predicate facts. Notably, because discovery was stayed pending resolution of this motion, the parties have not been deposed and subjected to cross-examination. The court is unable to afford much weight to the defendants" sparse and self-serving affidavits.

The court finds there are material disputed facts from which a jury could conclude that defendants were either plainly incompetent or knowingly violated the proscription against being deliberately indifferent to an inmate's serious medical needs. The facts, when viewed most favorably to the plaintiff, would permit a reasonable jury to find that Saylor's PTSD was a serious medical need, and the importance of proper mental health treatment was obvious from the diagnosis of PTSD, prescriptions for medication, and treatment that are reflected in medical records that were in the defendants' possession.

Based on the evidence, a jury crediting the plaintiff's testimony could find the defendants knew of and deliberately disregarded the plaintiff's need for proper medication and appropriate therapy to deal with the symptoms of PTSD. Viewing the evidence in the light most favorable to the plaintiff, a jury could find that the defendants' conduct violated Saylor's Eighth Amendment rights.

On this record, the court cannot find as a matter of law that the defendants are entitled to qualified immunity from suit for deliberate indifference to serious medical needs.[7] The court finds there are genuine issues of material fact on issues that form the predicate of a constitutional claim.

Further, the plaintiff's action is not barred by the statute of limitations. The record shows that the defendants' allegedly unconstitutional acts were part of

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[7] The court's review of the evidence shows that there are numerous instances of inconsistencies between the institutional records and the affidavits of the defendants. For example, all of the defendants testified by affidavit that the reason for Saylor's transfer to Tecumseh was to provide him "continuity of care," but the reason stated in the transfer order is "institutional needs." *Compare* Filing No. 143, Index of Evid., Ex. -1 *with* Filing No. 143, Index of Evid., Ex. 9. (143-9). The plaintiff testified that Dr. Weilage told the plaintiff in September 2010 that Weilage would continue to treat him at Tecumseh, but the records show Weilage did not contact the plaintiff until nineteen months later. In addition, the testimonies of Britten and Bakewell are in conflict as to what is or is not a "reclassification action." These inconsistencies raise serious questions with respect to both the credibility of witnesses and the completeness and reliability of the records.

a continuing violation that extends into the limitations period.

IT IS HEREBY ORDERED:

1. Defendants' motion for summary judgment (Filing No. 141) is denied.

2. Plaintiff's motion to defer or deny summary judgment (Filing No. 166) is denied as moot.

3. Plaintiff's motion to reopen summary judgment (Filing No. 174) is granted; the amended Proposed Supplemental Response to Plaintiff's Amended Response to Movant's Statement of Material Facts (Filing No. 174-1), proposed index of evidence, (Filing No. 174-2), and supporting documentary evidence (Filing No. 174-3 to 174-11) are deemed filed instanter.

4. Plaintiff's motion for leave to file a reply brief (Filing No. 175) is granted; the proposed Reply Brief is deemed filed instanter.

5. Counsel for the plaintiff shall contact the chambers of U.S. Magistrate Judge Thomas Thalken within ten (10) days of the date of this order to schedule a telephone conference.

DATED this 22th day of December, 2014.

BY THE COURT

s/ Joseph F. Bataillon
Senior United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 14-3889

James Saylor

Appellee

v.

State of Nebraska
Randy Kohl, M.D., et al.

Appellants

Nebraska Department of Correctional Services, et al.
Cameron White, PhD., et al.

Appellants

Correct Care Solutions, LLC.

Appeal from U.S. District Court for the
District of Nebraska-Lincoln
(4:12-cv-03115-JFB)

ORDER

The petition for rehearing by the panel is denied. The petition for en banc rehearing remains pending.

March 04, 2016

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

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(4:12-cv-03115-JFB)

ORDER

The petition for rehearing en banc is denied.

March 28, 2016

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans