

No. 21-6553

United States Court of Appeals
FOR THE FOURTH CIRCUIT

GARY WALL,
Plaintiff-Appellant,

v.

E. RASNICK, et al.,
Defendants-Appellees.

**Appeal from the United States District Court
for the Western District of Virginia**

APPELLANT'S OPENING BRIEF

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STATEMENT OF JURISDICTION

This is a 42 U.S.C. § 1983 action involving Eighth Amendment and supplemental state law claims. The district court had subject-matter jurisdiction under 28 U.S.C. §§ 1331 and 1367(a). The district court entered a final order against Plaintiff-Appellant Gary Wall on March 23, 2021. JA1331. Mr. Wall placed a timely notice of appeal in the prison mail system thirteen days later, on April 5, 2021. JA1333; *see* Fed R. App. P. 4(a)(1), (c)(1). This Court has appellate jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

- I. Whether the district court abused its discretion in upholding the magistrate judge's order denying sanctions against the defendants for the spoliation of video evidence.
- II. Whether the district court clearly erred in relying on the remaining, incomplete video evidence to credit the defendants' testimony over Mr. Wall's.
- III. Whether defendant-counterclaimant Elijah Rasnick's failure to present evidence that Mr. Wall struck him or created any apprehension of an imminent battery requires reversal of the district court's finding that Mr. Wall assaulted and battered him.

STATEMENT OF THE CASE

This case concerns a violent incident involving several correctional officers and Mr. Wall at Red Onion State Prison on August 14, 2015. After two correctional officers—Officers Jason Hicks and Elijah Rasnick—approached Mr. Wall in a pod of the prison’s Alpha Building, the incident ensued. During the incident, additional officers entered the pod and sprayed Oleoresin Capsicum (O.C.) pepper spray on Mr. Wall’s face. More officers arrived and took Mr. Wall to the prison’s Bravo Building, where they placed him in restraints for three hours without decontamination from the O.C. spray.

Mr. Wall filed suit pro se pursuing (as relevant here) Eighth Amendment excessive force and state law assault claims against Officers Hicks and Rasnick for attacking him. He also filed Eighth Amendment claims against other defendants for excessive force, assault, and denying him medical care in the hours that followed the altercation. Officers Hicks and Rasnick filed assault and battery counterclaims. After a bench trial before a magistrate judge, the district court adopted the magistrate judge’s recommendation to rule against Mr. Wall and in favor of the defendants on all claims.

I. Mr. Wall's Complaint and Pre-Trial Proceedings

Mr. Wall filed a 42 U.S.C. § 1983 suit seeking damages from Red Onion State Prison officials employed by the Virginia Department of Corrections (collectively, “the defendants”). JA16; JA38; JA58–63; JA69–73. Mr. Wall’s complaint alleged that after a verbal altercation, Officer Rasnick grabbed and punched Mr. Wall; Officer Hicks took Mr. Wall to the ground; and both officers hit Mr. Wall. JA61–62. Sergeant Travis Large then entered the pod and sprayed O.C. spray in Mr. Wall’s face, after which Mr. Wall was kicked and punched until he lost consciousness. JA62. Mr. Wall’s complaint also stated that, after he regained consciousness, officers bent his “fingers and wrist [at] an unnatural angle,” “repeatedly le[d] [him] into poles” in a recreation yard outside the Alpha Building, and slammed his face into a wall inside the Bravo Building. JA62. Officers next took Mr. Wall to a cell and placed him in restraints and a spit mask, at which point he again lost consciousness. JA62–63.

The defendants answered, and Officers Hicks and Rasnick filed counterclaims for assault and battery. JA76; JA48–52. The district court

referred Mr. Wall's case to a magistrate judge pursuant to 28 U.S.C. § 636(b)(1). JA90.

Through discovery, Mr. Wall sought video recordings of the incident from locations inside the Alpha Building, between the Alpha and Bravo Buildings, and inside the Bravo Building. JA75; JA86. The defendants produced some video recordings from wall-mounted cameras inside the Alpha Building and a handheld camera an officer used inside the Bravo Building. *See* JA95–96.¹ Mr. Wall then moved to compel the production of video evidence from cameras located in recreation yards outside the Alpha and Bravo Buildings and inside the Bravo Building. JA87. The magistrate judge compelled the production of that evidence. JA91–92. The defendants responded that they were “unaware of any other retained

¹ The wall-mounted cameras were located in a vestibule of the Alpha Building (A123 Vestibule Video), an entrance to that building (A123 Entrance Video), and three areas inside the Alpha pod where the altercation began (A1 Pod PTZ Video; A1 Pod Left Video; A1 Pod Right Video). Videos from these cameras do not contain audio and appear as frame-by-frame moving images rather than continuous video. The defendants also produced one handheld video recording with audio from inside the Bravo Building. The video was saved as “ROSP_081414_1133749_1,” but this brief refers to it as “Handheld Video.”

video footage from [August 14, 2015,]” beyond the footage they previously produced. JA95–96.

Mr. Wall moved for spoliation sanctions on the basis that the defendants failed to preserve video footage from the recreation yards between the Alpha and Bravo Buildings and inside the Bravo Building that would have shown officers’ treatment of Mr. Wall and his condition after officers took him out of the Alpha Building. JA106; JA110–15.

II. Trial Proceedings and Factual Background

The magistrate judge held a two-day bench trial on January 23 and 24, 2019. Mr. Wall proceeded pro se and testified on his own behalf. Thirteen officials testified against Mr. Wall. The magistrate judge reviewed some of the available video evidence throughout the proceedings. The magistrate judge also heard testimony and argument regarding Mr. Wall’s motion for spoliation sanctions.

After trial, the magistrate judge denied Mr. Wall’s spoliation motion. The magistrate judge then issued a report and recommendation to enter judgment against Mr. Wall on his claims and in favor of Officers Hicks and Rasnick on their counterclaims. The magistrate judge relied on the preserved video evidence and credited all of the testifying

defendants regarding (1) the altercation in the Alpha Building, (2) the arrival of additional officers and use of O.C. spray, and (3) defendants' subsequent treatment of Mr. Wall.

A. Defendants' Testimony regarding August 14, 2015

1. The altercation between Officers Hicks and Rasnick and Mr. Wall in the Alpha Building

Officers Hicks and Rasnick testified that, during recreation time in a pod of the prison's Alpha Building, they heard Mr. Wall yelling at a control booth officer. JA819; JA410–11. Officer Hicks then ordered Mr. Wall to “lock down” in his cell—an order he said Mr. Wall disobeyed. JA819. Officer Hicks next ordered Mr. Wall to go to a vestibule area that separated the pod from the building's entrance. *See* JA820.

After Mr. Wall approached that vestibule area, with Officers Hicks and Rasnick following behind him, an altercation ensued. That vestibule area was in the “blind spot” of the Alpha Building's camera system, so there is no video evidence of how it began. JA1318. Officer Rasnick testified that he ordered Mr. Wall, whose back was to both officers, to “cuff up.” JA391–92. Officer Rasnick reached for Mr. Wall's right hand, JA391, and Officer Hicks reached for Mr. Wall's left arm, JA824. At that point, Officer Hicks testified that “[Mr. Wall] spun around” and swung at

Officer Hicks but missed. JA820. Officer Rasnick initially testified that Mr. Wall “swung and struck [Officer] Hicks.” JA391. Officer Rasnick later conceded that he had not seen Mr. Wall hit Officer Hicks. JA395–96.

The three men then came into view of a camera. *See* A123 Vestibule Video, 4:00:52–4:01:04.² Officer Hicks identified himself as the officer in the frame at 4:00:53 “establish[ing] a grip” on Mr. Wall, who can be seen in the white t-shirt. JA837–38. At trial, Mr. Wall asked Officer Hicks about a segment of the video that captured an arm going “back” before making a “swinging motion.” JA841; A123 Vestibule Video at 4:00:59. Officer Hicks “believe[d] [it] could be” his own arm. *See* JA840–42.

The officers testified that they took Mr. Wall to the ground and that he continued “fighting” on the ground. JA414–15; JA824. Officer Hicks said he “had [Mr. Wall’s] left arm pinned behind [Mr. Wall],” but Mr. Wall’s right hand was “loose.” JA827. Officer Hicks next testified that Mr. Wall’s right hand “swung up” and punched Officer Hicks “in the [right] eye.” JA827–28.

² This brief, like the district court’s opinion, refers to times listed in the top right corner of each video from the wall-mounted cameras, which corresponded to the time of day.

The three men appear on the ground at 4:01:04–4:01:10 of the A123 Vestibule Video. Beginning at 4:01:06, the video shows Mr. Wall’s body beneath the two officers. Officer Hicks weighed 250 pounds. JA869. Mr. Wall weighed 160 pounds. JA869.

Upon seeing this video, Officer Hicks testified that it was Mr. Wall’s “left arm” that struck him. JA830–31. When the video was paused at 4:01:06, Officer Hicks testified that “[r]ight in this frame” was “when [Mr. Wall] hit [him].” JA831. The magistrate judge remarked that “the video neither confirms nor denies what occurred. It doesn’t show it.” JA836–37.

2. Sergeant Travis Large and Lieutenant James Lyall’s Entry into the Alpha Pod

Next, Sergeant Travis Large and Lieutenant James Lyall entered the pod. JA872; JA877–78. Sergeant Large testified that he saw Mr. Wall “squirming side to side trying to get loose . . . and swinging [his] fists and elbows.” JA937; *see also* JA950 (referring to Mr. Wall “swinging [his] arms”). Sergeant Large also testified that he said “stop,” then sprayed O.C. in Mr. Wall’s face, after which Mr. Wall “calm[ed] down a little bit.” JA937; JA944; JA955. In his incident report, Sergeant Large wrote that Mr. Wall “was still resisting and striking staff with his fists” after having been sprayed. JA1204. Lieutenant Lyall and Sergeant Large then

testified that they placed Mr. Wall in handcuffs. JA878; JA944. Video shows Mr. Wall's body on the ground, beneath Lieutenant Lyall, Sergeant Large, and Officers Hicks and Rasnick. *See* A1 Pod PTZ Video, 4:01:29–4:02:15. Mr. Wall's white shoes are visible. The officers denied kicking and punching Mr. Wall and seeing any indication he lost consciousness. JA864–65; JA877–78; JA880; JA944; JA416.

3. Transfer to the Bravo Building, Use of Five-Point Restraints, and Documentation of Injuries

Another group of officers arrived and took Mr. Wall from the Alpha Building, where the incident occurred, across a recreation yard to the Bravo Building. Video evidence exists of the exit from the Alpha Building. *See* A123 Entrance Video. Mr. Wall enters the frame at 4:02:53.

Sergeant Large testified that he asked Mr. Wall if he needed “decontamination” (to wash off the O.C. spray) as they left the Alpha Building and Mr. Wall “refused to respond.” JA938–41; JA945. Lieutenant Larry Collins, who arrived at the Alpha Building and walked with the group, testified that Mr. Wall was making threats and did not respond to an offer to decontaminate. JA889; JA894–98; *see also* JA1194. Lieutenant Collins, Sergeant Large, and Officer Edward Gwinn denied

ramming Mr. Wall into walls or poles and denied seeing other officers do so. JA895–96; JA946; JA1002–03.

At some point after Mr. Wall’s arrival in the Bravo Building’s vestibule, an officer began recording with a handheld camera. *See* Handheld Video, 0:01; JA902; JA932.³ At 0:15, Lieutenant Collins can be heard yelling, “What’s your fucking name?” at Mr. Wall.

Lieutenant Collins testified that Mr. Wall was “making statements [that he was] going to harm staff” in the Bravo Building vestibule. JA896–97. After Lieutenant Collins received authorization from Warden Earl Barksdale to place Mr. Wall in restraints, a group of officers transferred Mr. Wall from the vestibule to a cell equipped with a camera (a “camera cell”). JA890; JA893; JA906. The handheld video captured parts of the transfer beginning at the 5:20 mark. Mr. Wall’s face appears momentarily at 5:25. His head is bent down, he has blood on his face, and there are blood stains on his white t-shirt. *See also* JA863. At 6:04, Mr. Wall appears doubled over.

³ Like the district court, this brief uses times from the middle of the screen for the handheld video.

In the cell, Lieutenant Collins and Officers Steven Taylor, Brian Akers, and Cody Bishop placed Mr. Wall in a spit mask and five-point restraints (leather straps attached to his wrists and ankles and across his midsection while he was lying down). *See* JA912; JA490–93; JA1194. Nurse Janet Deel enters the cell at around 16:08. About thirty seconds later, at 16:40, an officer can be heard saying, “You got any complaints for the nurse?” After Mr. Wall does not audibly respond, the officer says in a louder tone, “Wall!” Handheld Video at 16:44. Then, at 17:14, Nurse Deel asks, “Anything you want to tell me, Wall?” And, at 17:15, an officer can be heard saying “Wall, nurse is here.” Mr. Wall does not audibly respond. Nurse Deel leaves the cell at 17:29. Nurse Deel testified that Mr. Wall was conscious when she saw him and did not speak to her. JA971–72, JA987.

Roughly three hours later, around 7:30 pm, Mr. Wall was transferred to Wallens Ridge State Prison. JA1213. There, Mr. Wall received medical attention at approximately 9:10 pm. JA499. A nurse’s assessment noted among other injuries that Mr. Wall had “[p]eriorbital edema [around his] right eye,” “some edema across [the] bridge of [his] nose,” swollen lips, “three well-defined red marks . . . on [the] left side of

his neck,” swelling on the back of his head, as well as “pain and tenderness [in his] left wrist and left [fif]th finger.” JA974; JA499–500. The nurse called a doctor at 10:30 pm, who ordered x-rays, which later found a fracture at the top of a finger on Mr. Wall’s left hand. JA500, JA524.

Officers Hicks and Rasnick testified about their own injuries from the incident. Officer Hicks had a cut above his right eye and a broken right hand that he could not recall how he injured. JA851–57; JA865. He also testified that he later was diagnosed with complex post-traumatic stress disorder. JA866–67. Officer Rasnick stated that he “twisted [his] right knee and tore [his] meniscus.” JA396; JA405; JA416–21.

B. Evidence regarding Mr. Wall’s Motion for Spoliation Sanctions

At trial, the magistrate judge also received evidence and heard testimony regarding Mr. Wall’s requests to obtain review of video evidence from the incident. Within days of the incident, assigned to a “[m]edical [b]ed” at Wallens Ridge, Mr. Wall began to request that prison officials review video footage that captured what happened. *See* JA1178.

Mr. Wall started the prison’s grievance process by filing an “informal complaint” alleging that Officers Hicks and Rasnick had

“attacked and assaulted” him in the Alpha Building. JA1178. He wrote that, after the attack, he “was [g]assed, repeatedly [p]unched and [k]icked, and [had his] fingers . . . bent to the point [that his] hand was fractured.” JA1178. That “use of force while [he] was restrained continued until [he] reached [a pod in the] Bravo [Building],” after which officers placed him “in five-point restraints for several hours without being de-contaminated.” JA1178. He requested review of video recordings from between 4:00 and 5:00 pm from the Alpha Building pod, Alpha and Bravo Building recreation yards, Bravo Building vestibule, and the Bravo Building camera cell, in addition to any handheld footage from when he was placed in and removed from restraints. JA1178.

An intelligence officer at Red Onion (James Bentley) testified that he received Mr. Wall’s complaint on August 25, 2015, and wrote that the Special Investigations Unit (SIU) was investigating the incident. JA787–90; JA799–802; JA1178; *see also* JA789 (explaining that SIU investigates criminal allegations against prison staff). On August 30, Mr. Wall sent a sworn account of the events to SIU. JA712–16. Among other things, it alleged that officers “rammed” him “into pol[e]s, doors, and walls en

route” from the Alpha to the Bravo Building and continued their abuse inside the Bravo Building. JA714–15.

Mr. Wall also submitted a “regular grievance.” JA1179 (dated September 13). He reiterated his allegations from the informal complaint and the times and locations associated with “camera footage available to support [his] grievance.” JA1179.⁴

Department of Corrections (“DOC”) policy required that, when an inmate files a “grievance . . . that references a specific . . . video recording, a copy of the recording shall be made and maintained at the facility.” JA116. The policy also stated that such recordings “will be maintained at the unit for a minimum of three years following final disposition of the grievance” or, if a matter is “under investigation or litigation,” “until completion of the investigation or litigation.” JA116. To save a video from being automatically recorded over with new footage (after ninety days), a prison intelligence official needed to download it from a building’s

⁴ Shortly after the incident, Mr. Wall was charged with various disciplinary violations, including aggravated assault. *See* JA567; JA591; JA612; JA636; JA649. Mr. Wall requested the review of video footage in connection with each of his disciplinary charges. *See, e.g.*, JA572; JA577; JA595; JA597–98; JA618; JA622–23; JA640; JA642–43; JA656–57; JA206–16. All of Mr. Wall’s requests for video footage were denied, and the hearing officers found Mr. Wall guilty on all charges. *See* JA206–16.

camera system and save it to a desktop. *See* JA791–95. And, if SIU requested video footage, the officer “would make DVDs or CDs and give it to [SIU].” JA796.

Intelligence Officer Bentley was “sure” SIU requested and received “video footage of the incident” in Mr. Wall’s case. JA802–03. He did not know which videos SIU requested, “[b]ut what they asked for is what they would have got.” JA803.

In December 2015, an SIU agent completed an investigative report. JA703–10. The report referred to video of the altercation in the Alpha Building and “the handheld camera video of [Mr.] Wall being escorted to Bravo Building.” JA705. That report also described Mr. Wall’s allegations of being beaten in the Alpha Building, “pushed into poles, doors and walls while being escorted to [the] Bravo building,” having his face slammed into a wall in the Bravo Building, and not being allowed to wash O.C. spray off of his face. JA706. In January 2016, SIU sent that report to a county prosecutor’s office. JA702. Criminal charges were filed against Mr. Wall, but, in June 2016, the Wise County prosecutor entered a nolle prosequi on those charges. *See Commonwealth v. Wall*, No. CR-16-F-

0055-00 (Wise County Cir. Ct. June 23, 2016); *Commonwealth v. Wall*, No. CR-16-F-0055-01 (Wise County Cir. Ct. June 23, 2016).

C. Post-Trial Argument regarding Spoliation

After the parties rested, the magistrate judge heard argument on Mr. Wall's motion for spoliation sanctions. JA1115–23. The magistrate judge began by referring to other instances of missing videos involving DOC: "I think maybe other judges have already ruled against [DOC], I haven't yet, but when I get the right case, I probably will." JA1115. The magistrate judge observed that Mr. Wall's informal complaint "couldn't have been more specific about what he wanted" and "clearly . . . somebody at the prison was put on notice that he was claiming this video was relevant." JA1115. "For whatever reason," the magistrate judge added, "somebody decided not to preserve all of that. Everybody concedes it wasn't preserved." JA1115.

After the magistrate judge referenced the video that "would have shown . . . if [Mr. Wall had] been run into poles," the defendants did not dispute that "it wasn't preserved." JA1116. When questioned about the video footage, the defendants also conceded that "someone did go in, look

at this while it still existed and saved portions of it and didn't save all of it." JA1117–18.

III. The Magistrate Judge's Post-Trial Order Denying Spoliation Sanctions and Report and Recommendation

After trial, the magistrate judge denied Mr. Wall's motion for sanctions in a one-page order. *See* JA1223. The order found "that the video evidence which the plaintiff had requested was preserved and presented at trial" and "the plaintiff did not provide timely specific requests that the defendants preserve additional video recording evidence." JA1223. The magistrate judge also denied Mr. Wall's motion on the basis that he did not "produce any evidence at trial that the defendants purposefully disposed of any video recordings in an effort to prevent their use at trial." JA1223.

The magistrate judge then issued a report and recommendation to rule against Mr. Wall on his claims and for Officers Hicks and Rasnick on their counterclaims. JA1224–91. The report recommended finding that Mr. Wall "provoked the initial use of force by [Officers] Hicks and Rasnick" and that officers needed to use pepper spray and "physical force . . . to place [Mr.] Wall in restraints" when he "continu[ed] to struggle with the officers." JA1279. The magistrate judge explained that

all the officers who testified disputed Mr. Wall's account, and "the video evidence confirms much of the officers' version of events," while "refut[ing]" Mr. Wall's account of having been punched and kicked. JA1279–80.

The report next recommended finding that Mr. Wall "continued to threaten staff" after being removed from the Alpha Building pod and found not credible that "officers purposefully ran [Mr. Wall] into fence posts and door frames as they escorted him to the B[ravo] Building." JA1280. And the magistrate judge recommended finding that none of the officers acted "maliciously or sadistically"—for purposes of an excessive force claim—or with deliberate indifference toward serious medical needs by placing Mr. Wall "in five-point restraints without a shower or any treatment for his injuries." JA1281–82.

The magistrate judge recommended awarding compensatory and punitive damages to Officers Hicks and Rasnick for their counterclaims and denying Mr. Wall's claims. JA1284–86; JA1288–90.

IV. The District Court’s Order Adopting the Report and Recommendation

Mr. Wall objected to the discovery order as well as the report and recommendation. *See* JA1292–97.⁵ The district court adopted, in part, the report and recommendation, but did not discuss the magistrate judge’s denial of sanctions or Mr. Wall’s objections to that order. *See* JA1317–31.

The district court found that Mr. Wall “initiated the altercation . . . by resisting [Officers Hicks and Rasnick’s] attempts to restrain him and escalated the conflict by striking” them both. JA1328. The district court also credited testimony that Mr. Wall was “unrestrained and actively resisting” when Lieutenant Lyall and Sergeant Large arrived. JA1326. The district court reasoned that “[v]ideo evidence corroborates the officers’ account” and Mr. Wall’s account was “contradicted by four credible witnesses and the video recordings of the incident.” JA1326.

The district court also adopted the magistrate judge’s findings regarding the “decision not to decontaminate [Mr. Wall] from O.C. spray.” JA1326. The district court assumed Mr. Wall had an “objectively serious”

⁵ Mr. Wall also requested that the magistrate judge reconsider the discovery order, *see* JA1313, but the magistrate judge denied that motion without providing additional reasoning, *see* JA1316.

medical need, but found that Mr. Wall had “implicitly declined decontamination when asked and showed no signs of needing it when examined.” JA1327–28. The district court credited the testimony of Lieutenant Collins, Sergeant Large, and Nurse Deel, and noted that handheld video footage showed Mr. Wall neither exhibiting “typical symptoms associated with O.C. spray” nor “request[ing] any decontamination . . . despite being asked if he had any complaints for the nurses to address.” JA1327–28.

Finally, the district court awarded compensatory damages for Officers Hicks and Rasnick’s counterclaims (\$20,000 each), but declined to impose punitive damages. JA1329.

Mr. Wall appealed, and this Court appointed undersigned counsel to represent him. This Court identified two “issues of particular interest”: the “[s]ufficiency of the evidence . . . on excessive force and related claims,” and whether the “district court erred in denying [the] spoliation motion.” Appointment Letter, Doc. 19.

SUMMARY OF THE ARGUMENT

This case demands proper consideration of the videos DOC willfully destroyed and the ones it selectively preserved. DOC destroyed numerous videos after Mr. Wall alleged that they would corroborate his account of the defendants attacking and abusing him. And, after failing to address that destruction, the district court clearly erred in basing its findings on the few videos DOC decided to preserve: Those videos corroborate Mr. Wall's testimony and undermine the defendants'.

The district court first committed reversible error in silently overruling Mr. Wall's objection to the magistrate judge's order denying spoliation sanctions. To not even mention Mr. Wall's objection on this critical issue constituted an abuse of discretion. And the magistrate judge relied on clear errors and mistakes of law. Contrary to the magistrate judge's order, the seriousness of the incident and Mr. Wall's requests for DOC to review specific videos within days of the incident gave DOC and the defendants notice that each video was relevant to future litigation, triggering their duty to preserve each one. But DOC willfully destroyed some, while preserving others. The magistrate judge's order also demands reversal to the extent it required Mr. Wall to prove that the

defendants disposed of videos for the specific purpose of preventing their use at trial. The law only required a showing of prejudice, which is evident in this credibility-centered case. And, though it was not necessary, Mr. Wall did present evidence of bad faith from DOC's selective destruction of video footage that violated its own preservation policy. This Court should reverse and remand for a proper spoliation analysis against each defendant and further proceedings in light of the sanctions imposed.

Without addressing the spoliated video, the district court used the remaining video to credit the defendants' accounts over Mr. Wall's. That was clearly erroneous. The district court inaccurately described the video and failed to address aspects of it that undermine the defendants' testimony and are more consistent with Mr. Wall's. The district court even used a lack of corroborating video evidence against Mr. Wall, without applying that same reasoning to the defendants when the video failed to support—or even undermined—their testimony. The district court's errors reveal a defective fact-finding process that requires reversal and remand.

Independent of these errors, the district court's judgment in favor of Officer Rasnick on his counterclaims demands outright reversal. Officer Rasnick presented insufficient evidence to prove Mr. Wall assaulted and battered him. The district court erroneously conflated these independent torts and determined that Mr. Wall committed both by striking Officer Rasnick. But Officer Rasnick testified that Mr. Wall did *not* strike him during the altercation. And Officer Rasnick presented no evidence of apprehension of an imminent battery.

ARGUMENT

I. The district court committed reversible error in denying Mr. Wall’s motion for sanctions after DOC willfully destroyed video recordings of the incident.

This Court should reverse and remand for further proceedings on Mr. Wall’s excessive force, deliberate indifference, and assault claims, as well as Officers Hicks and Rasnick’s counterclaims, because the district court erroneously affirmed—with no explanation—the magistrate judge’s order denying sanctions for spoliation of video evidence.

“Spoliation refers to the destruction or . . . failure to preserve property for another’s use as evidence in pending or reasonably foreseeable litigation.” *Silvestri v. Gen. Motors Corp.*, 271 F.3d 583, 590 (4th Cir. 2001). This Court recognizes a district court’s “inherent power” to impose sanctions for spoliation based on “the need to preserve the integrity of the judicial process in order to retain confidence that the process works to uncover the truth.” *See id.* Federal Rule of Civil Procedure 37(e)(1) also empowers a district court to impose sanctions when “electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it,” that information “cannot be

restored or replaced,” and the loss results in “prejudice to another party.” Upon finding those elements, a court “may order measures no greater than necessary to cure the prejudice.” Fed R. Civ. P. 37(e)(1).

This Court reviews for abuse of discretion orders regarding requests for spoliation sanctions. *See Silvestri*, 271 F.3d at 590–91. “A district court abuses its discretion if it relies on an error of law or a clearly erroneous factual finding.” *E.E.O.C. v. Freeman*, 778 F.3d 463, 466 (4th Cir. 2015).

As a threshold matter, Mr. Wall timely filed an objection to the magistrate judge’s non-dispositive order on spoliation, yet the district court did not address the order or his objection at all. *See* JA1296–97. That in itself was error: Faced with a timely objection, the district court was obligated to review whether the order “[wa]s clearly erroneous or . . . contrary to law.” *See* Fed. R. Civ. P. 72(a). And it requires reversal because the district court did not even mention Mr. Wall’s objection or spoliation, a central issue in this case that turned on video evidence and credibility. On remand, the district court “should clearly state its reasons” for overruling the objection, “so that meaningful review may be had on appeal.” *See Wilson v. Volkswagen of Am., Inc.*, 561 F.2d 494, 505

(4th Cir. 1977) (discussing review of a district court’s grant of default judgment under Fed. R. Civ. P. 37(b)) (quoting *Int’l Brotherhood of Teamsters v. United States*, 431 U.S. 324, 376 (1977)); *see also Mut. Serv. Ins. Co. v. Frit Indus., Inc.*, 358 F.3d 1312, 1326–27 (11th Cir. 2004) (remanding after a district court concluded that a discovery response was “reasonable” and declined to impose a sanction, but did not explain “how it reached that conclusion”).

To the extent this Court views the district court as having considered and upheld the magistrate judge’s order, doing so was itself an abuse of discretion. The magistrate judge’s order was clearly erroneous and contrary to law. Mr. Wall is entitled to a remand for the district court to conduct a proper spoliation analysis.

A. The magistrate judge’s decision to deny spoliation sanctions relied on clearly erroneous findings and was contrary to law.

1. Mr. Wall timely and specifically requested review of relevant video evidence that the defendants and DOC failed to preserve despite their duty to do so.

The magistrate judge’s order relied on two clearly erroneous factual findings: that “the video evidence which [Mr. Wall] had requested was preserved and presented at trial” and that “[Mr. Wall] did not provide timely specific requests that the defendants preserve additional video

recording evidence.” JA1223. Mr. Wall demonstrated that the defendants and DOC “reasonably should [have] know[n] that the [video] evidence” Mr. Wall repeatedly sought review of “may [have] be[en] relevant to anticipated litigation,” triggering the duty to preserve it. *See Silvestri*, 271 F.3d at 591. And there was no dispute that videos from between the Alpha and Bravo Buildings and inside the Bravo Building were not preserved.

First, Mr. Wall’s requests were timely. From a medical bed at a different prison, Mr. Wall followed DOC procedure by submitting an informal complaint and a regular grievance that described the videos he sought to preserve within thirty days of the incident. *See* JA1178 (informal complaint dated five days after incident); JA1179 (regular grievance dated thirty days after incident); JA1304–06 (operating procedure requiring informal complaints to be submitted “in a timely manner” and regular grievances within thirty days of the “occurrence/incident”). The videos still existed when he filed each request; each camera could preserve video for ninety days. *See* JA791–92.

Next, Mr. Wall's requests were specific and detailed. Each one alleged abuses that continued from the beginning of the altercation in the Alpha Building until officers took Mr. Wall to the Bravo Building and placed him in five-point restraints. *See* JA1178–79. Each one specifically referenced cameras in the Alpha Building, the recreation yards between the Alpha and Bravo Buildings, the Bravo Building's vestibule, and the camera cell, plus gave a relevant timeframe: 4:00 to 5:00 pm on the day of the incident. *See* JA1178–79. That triggered DOC's policy that, "[i]f a grievance . . . references a specific . . . video recording, a copy of the recording shall be made and maintained at the facility." *See* JA116.

Mr. Wall also submitted a sworn statement to SIU just over two weeks after the incident. *See* JA712–16. He explained in detail the unnecessary force he experienced, including that prison officials rammed him into poles and doorways. *See* JA712–16.

Mr. Wall did more than enough to provide notice that certain video evidence was relevant, triggering the duty to preserve it. Even the magistrate judge observed at trial that Mr. Wall "couldn't have been more specific about what he wanted," and "clearly . . . somebody at the prison was put on notice that he was claiming this video was relevant." JA1115.

If this incident—so serious that it prompted an SIU investigation and later-dropped criminal charges against Mr. Wall—and Mr. Wall’s written requests did not put the defendants and DOC on notice of the relevance of the videos to numerous aspects of this case, it is hard to imagine what could have.

Second, contrary to the magistrate judge’s determination that “the video evidence which [Mr. Wall] had requested was preserved and presented at trial,” JA1223, there was no dispute that, after Mr. Wall began to request DOC review, some videos were preserved and others were not. The defendants conceded that “someone” in DOC examined video footage “while it still existed and saved portions of it and didn’t save all of it.” JA1117.⁶ The destroyed footage documented prison officials’ behavior and Mr. Wall’s condition between the Alpha Building and Bravo

⁶ The defendants did not explain who that “someone” was. An intelligence officer at Red Onion, Officer Bentley, wrote in response to Mr. Wall’s informal complaint that the incident “[wa]s being investigated by . . . [SIU].” JA1178; *see also* JA787–90 (Officer Bentley testifying that he “assist[ed] [SIU] in their investigation”). Officer Bentley also testified that “[a]nybody” in the intelligence department at Red Onion had access to the video footage. JA798; *see also* JA810–11 (Officer Bentley testifying that he could not answer whether Red Onion conducted an investigation independent of SIU). And Officer Bentley did not know whether there was “any way that [he] c[ould] determine” who accessed the videos and when. *See* JA808–09.

Building, within the Bravo Building vestibule, and, eventually, in a camera cell. *See* JA110–14; JA1178–79. And the defendants did not dispute that video from between the buildings “wasn’t preserved.” JA1116. *See Buckley v. Mukasey*, 538 F.3d 306, 323 (4th Cir. 2008) (reasoning that “document destruction, though not conducted in bad faith, could yet be ‘intentional,’ ‘willful,’ or ‘deliberate’” (quoting *Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148, 156 (4th Cir. 1995))).

In sum, contrary to the magistrate judge’s order, Mr. Wall made multiple timely and specific requests for the review of video evidence that the defendants and DOC had a duty to preserve, but DOC willfully destroyed that evidence before trial.

2. To the extent the magistrate judge’s order required evidence of bad faith and stated that Mr. Wall had presented none, it relied on a legal error and a clear factual error.

Although the foregoing errors compel reversal, the magistrate judge’s order also erroneously stated that Mr. Wall did not “produce any evidence at trial that the defendants purposefully disposed of any video recordings in an effort to prevent their use at trial.” *See* JA1223. The magistrate judge did not explain whether or why Mr. Wall needed to present such evidence. To the extent the magistrate judge’s order

required a showing of bad faith, it constituted an abuse of discretion by relying on an error of law: To obtain a sanction, Mr. Wall only needed to show prejudice resulting from willful conduct that resulted in spoliation. Even so, Mr. Wall did produce evidence of bad-faith spoliation, and the magistrate judge clearly erred in deciding otherwise. Either of these errors independently justifies remand.

To start, Mr. Wall did not need to demonstrate bad faith to obtain spoliation sanctions. Only the most severe sanctions require that showing. *See, e.g.*, Fed. R. Civ. P. 37(e)(2). Mr. Wall only needed to show deliberate conduct resulting in a prejudicial loss or destruction of evidence. *See Vodusek*, 71 F.3d at 156; *Buckley*, 538 F.3d at 323. He did not need to show destruction “with the intent to deprive [him] of the information’s use in the litigation,” or bad faith. *See* Fed. R. Civ. P. 37(e)(2); *see also Buckley*, 538 F.3d at 323. Mr. Wall showed deliberate destruction when, as the defendants conceded, “someone did go in, look at [video footage] while it still existed and saved portions of it and didn’t save all of it.” *See* JA1117. And the magistrate judge should have conducted a proper analysis and considered “measures no greater than

necessary to cure the prejudice” from that destruction. *See* Fed R. Civ. P. 37(e); *see also Silvestri*, 271 F.3d at 593–94.

Mr. Wall also demonstrated prejudice. Each missing video was “an objective witness” in a case that pitted Mr. Wall’s credibility against the defendants. *See Pettit v. Smith*, 45 F. Supp. 3d 1099, 1111 (D. Ariz. 2014); *see also* Fed. R. Civ. P. 37(e) advisory committee’s note to 2015 amendment (“An evaluation of prejudice from the loss of information necessarily includes an evaluation of the information’s importance in the litigation.”). For example, the spoliation deprived Mr. Wall of video that could have confirmed his account of the events between the Alpha and Bravo Buildings. As the magistrate judge recognized, Mr. Wall had “a powerful argument that [one video] would have shown . . . if he’d been run into poles.” JA1116. As another example, the only video from inside the Bravo Building reflected what the magistrate judge thought was an officer’s “terrible job” of actually “record[ing] the events.” JA902. The officer holding a handheld camera made Mr. Wall’s body difficult or impossible to see; the wall-mounted cameras in the Bravo Building could not have recorded so selectively. Even the limited video evidence that remained undermined the officers’ credibility, as discussed *infra* Section

II. Mr. Wall was prejudiced by the destruction, and the magistrate judge committed reversible error in refusing to consider any sanction.

Even if bad faith were required, the magistrate judge clearly erred in finding that Mr. Wall failed to produce any evidence of bad faith. An officer at Red Onion reviewed Mr. Wall's informal complaint referencing the later-destroyed video footage. JA1178; JA787. That officer was "sure" that SIU requested and received video footage. JA802-03. And DOC violated its own policy that the videos Mr. Wall referenced in his grievance "will be maintained . . . for a minimum of three years following final disposition of the grievance." JA116. Selectively preserving some and not others is evidence that DOC and the defendants acted to prevent Mr. Wall from using the videos to seek relief against the many individuals up the chain of command who were involved in the incident and the events that followed.

And Mr. Wall's descriptions of what the missing videos would show put DOC and the defendants on notice of potential criminal allegations. On top of Mr. Wall's grievances about having been "[r]epeatedly punched [and] kicked," he sent a sworn statement to SIU specifically alleging that officers rammed him into poles, among other forms of excessive force. *See*

JA1178–79; JA714–15. Yet the defendants have offered no explanation as to how and when certain videos were destroyed or, critically, why only certain ones were preserved. The magistrate judge’s determination that Mr. Wall did not produce any evidence of bad faith was clearly erroneous.

Because of the clear factual and legal errors addressed above, this Court should reverse and remand for the district court to apply the correct standard in the first instance.

B. Mr. Wall is entitled to a proper spoliation analysis with respect to each defendant and DOC.

This Court should remand for the district court to conduct a spoliation analysis and consider sanctions against each defendant in the first instance. As discussed above, each defendant’s duty to preserve arose immediately after the incident or, at the latest, when Mr. Wall began the grievance process and specifically referenced each video. *See Silvestri*, 271 F.3d at 591. And the district court should have concluded that prison officials were responsible for the willful destruction of those videos for purposes of spoliation.

The defendants argued against the imposition of any sanction because DOC as an institution, not the individual defendants, had control over the spoliated evidence. *See* JA1118–21. But spoliation by a non-

party can be “imputed” to a party. *See Silvestri*, 271 F.3d. at 591–92. The district court did not adopt the broad rule the defendants urged, and this Court should not either. As the Sixth Circuit has recognized, “case-by-case” fact-intensive analyses of prison administrative decisions are the better course than “bright-line rule[s]” regarding the attribution of fault to prison staff after a prison destroys evidence. *See Adkins v. Wolever*, 692 F.3d 499, 506 (6th Cir. 2012). “[S]tate correctional departments . . . ultimately bear responsibility for preserving evidence and litigating cases filed by prisoners,” making imputation of both the duty to preserve and spoliation appropriate in certain cases “to avoid unfair prejudice.” *Johns v. Gwinn*, 503 F. Supp. 3d 452, 463 (W.D. Va. 2020) (quoting *Harvey v. Hall*, No. 7:17-cv-00113, 2019 WL 1767568, *6 (W.D. Va. Apr. 22, 2019), and collecting cases)); *see also id.* at 463–65.

In this case, the district court should have imputed DOC’s access to, control over, and destruction of the relevant video evidence to each defendant. Mr. Wall presented claims and evidence against numerous officers, supervisors, and the warden, all of whom were involved in the incident or the events that followed. *See, e.g.*, JA1122–23 (Mr. Wall explaining that he “ha[d] no control over” who received or responded to

his informal complaint and that he had named the warden among the defendants). Each defendant had a duty to preserve under spoliation law and a “uniquely intertwined relationship” with DOC. *See Johns*, 503 F. Supp. 3d at 463–65. And DOC controlled the video evidence and the grievance process by which Mr. Wall sought to preserve that evidence, triggering DOC’s own duty to preserve it as well. *See id.*

The district court failed to address the destruction of the videos and ultimately ruled in favor of the defendants based on its determinations that all those who testified were credible and Mr. Wall was not. *See* JA1325–28. These credibility determinations primarily turned on the district court’s conclusion that the preserved “[v]ideo evidence corroborate[d] the officers’ account.” *See* JA1325–26. But, in light of the selective preservation and prejudicial destruction of video discussed above, the district court committed reversible error when it relied on the few videos that remained to credit the defendants’ version of events.

This Court should reverse and remand for the district court to reopen proceedings and apply a proper spoliation analysis with regard to each defendant and DOC.

II. The district court clearly erred in using the preserved video evidence to credit the testifying defendants.

The video evidence the district court relied upon actually undermines the defendants' testimony and corroborates Mr. Wall's. The district court therefore reached its critical findings "without properly taking into account substantial evidence to the contrary." *See Miller v. Mercy Hosp., Inc.*, 720 F.2d 356, 361–62 (4th Cir. 1983). And the district court inexplicably viewed Mr. Wall's inability to corroborate certain aspects of his account with video evidence as damaging to his credibility, while failing to apply the same skepticism to the defendants when the video failed to support critical aspects of their testimony.

Beyond taking an improper view of the video, the district court failed to address significant gaps and inconsistencies in the defendants' testimony. *See id.* at 365–66; *Jiminez v. Mary Washington Coll.*, 57 F.3d 369, 379 (4th Cir. 1995). The district court's errors—viewed individually and cumulatively—demonstrate a defective "fact-finding process" and require reversal. *See Miller*, 720 F.2d at 361, 365.

A. The district court clearly erred in crediting Officer Hicks, Officer Rasnick, Sergeant Large, and Lieutenant Lyall and discrediting Mr. Wall to reach its findings regarding the events in the Alpha Building.

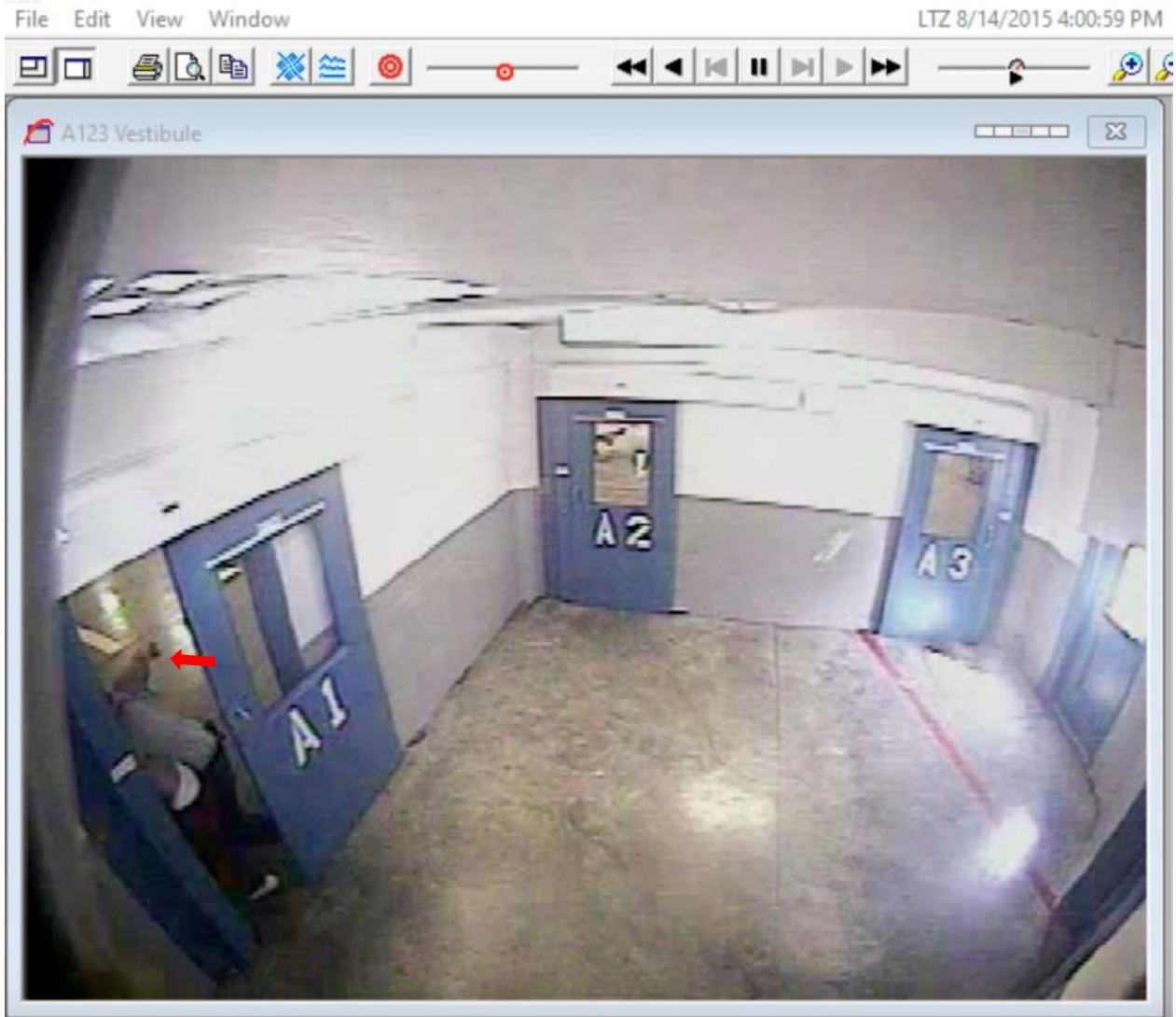
The district court’s critical findings about the altercation turned on video evidence. *See* JA1326 (stating that “[v]ideo evidence corroborates the officers’ account,” and that “[b]ased on this evidence . . . [Mr.] Wall’s version of events was not credible”). Relying on the video evidence, the district court credited the officers’ testimony that Mr. Wall punched Officer Hicks and “was unrestrained and actively resisting” with his fists and arms while on the ground. *See* JA1326; JA937. The video does not support that finding. The video never shows Mr. Wall swinging his hands or arms, let alone punching or striking an officer. It actually shows an officer cocking an arm back and bringing it towards Mr. Wall in a swinging motion before two officers go to the ground, appear to collide with one another, and position themselves over Mr. Wall’s body—all before two more officers arrive.

This Court can view the video to determine whether it in fact corroborates the defendants’ account and supports the district court’s findings. *See Stanley v. Hejirika*, 134 F.3d 629, 635 (4th Cir. 1998), *abrogated on other grounds by Wilkins v. Gaddy*, 559 U.S. 34, 39 (2010).

This Court reviews factual findings for clear error and, though it generally defers to a factfinder’s demeanor-based credibility assessments, can view “the same evidence” the factfinder relied on in this case and “have the same opportunity to evaluate what was seen.” *See id.* at 633, 635. And, when “objective evidence” like a video “may contradict [a] witness’ story,” an appellate court “may well find clear error even in a finding purportedly based on a credibility determination.” *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 575 (1985); *see also Scott v. Harris*, 550 U.S. 372, 380–81 (2007) (reviewing a summary judgment record “in the light depicted by [a] videotape”).

1. The district court incorrectly determined that “video shows [Mr.] Wall on his feet and actively resisting when the vestibule door opens.” JA1326. The district court cited thirty-three seconds of the A123 Vestibule Video to support this finding (4:01:03–4:01:36). JA1326. But the video does not show Mr. Wall engaging in any conduct that could be called “actively resisting” either before or after the vestibule door opened. *See* A123 Vestibule Video, 4:00:52–4:01:00. What it does show is an officer wrapping his arm around Mr. Wall’s neck and shoulder area beginning at 4:00:53.

2. Next, the district court did not address video footage showing an officer cocking an arm back and bringing it forward in a punching motion, which corroborates Mr. Wall's account of having been attacked. *See* A123 Vestibule Video at 4:00:57–4:01:00. Pause the video shown below at 4:00:59, and it shows an officer with his arm cocked behind him. Mr. Wall appears to be hunched over, with the white waistband of his underwear visible. Press play, and the arm moves toward Mr. Wall in a punching motion before disappearing from view. At trial, Officer Hicks initially stated that he had “no idea whose arm that was,” but later admitted “that could be” his arm. JA840–41.



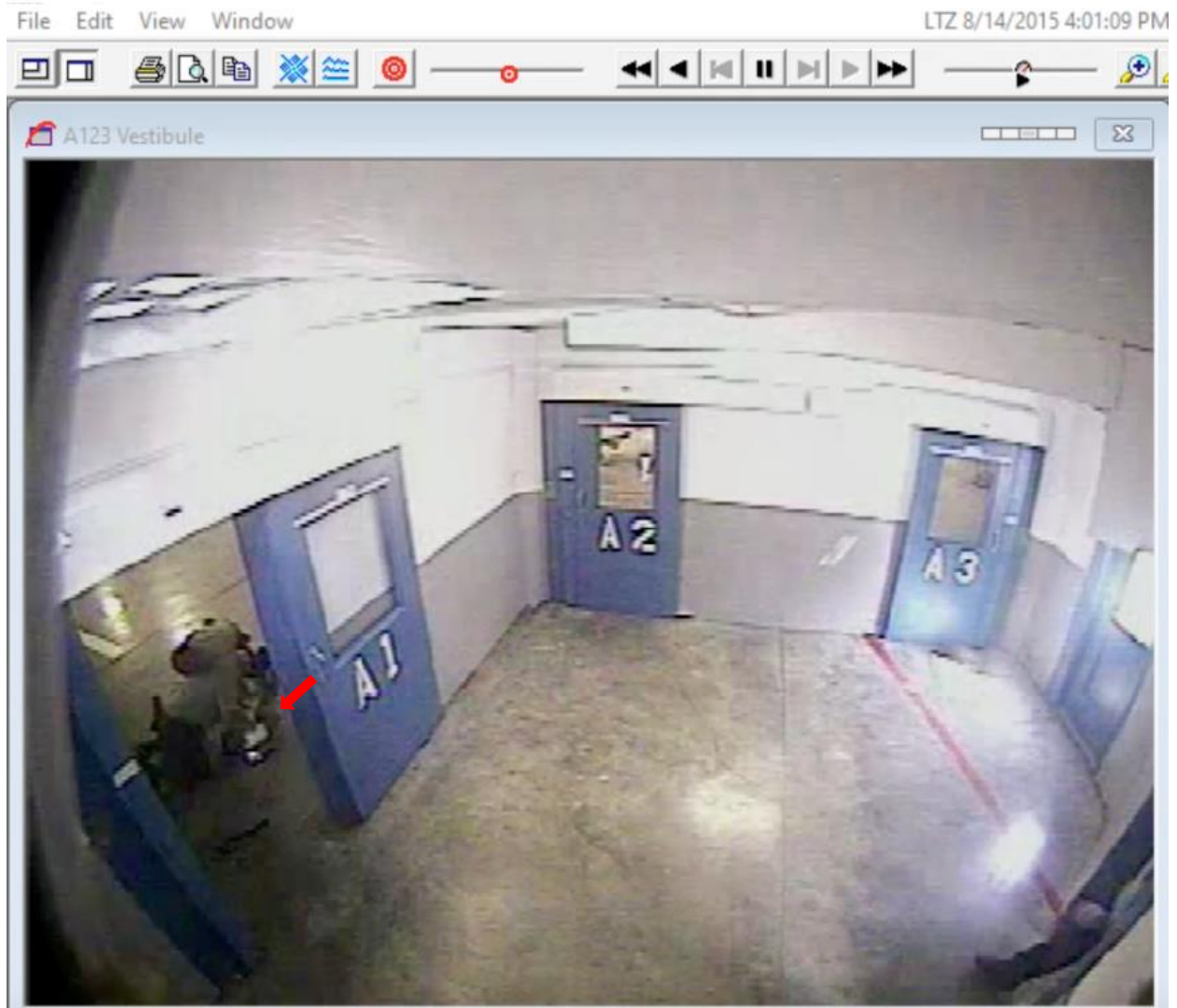
The district court thus ignored video corroborating Mr. Wall’s account. *See* JA181; JA307–08; JA61. And it did so after incorrectly finding that Mr. Wall was “on his feet and actively resisting.” *See* JA1326. Although the district court was not required to credit evidence that Officer Hicks punched Mr. Wall in this moment, the fact that the video did not actually “corroborate[] the officers’ account,” *see* JA1326, demanded further explanation from the district court to justify crediting

those officers. *See United States v. Chatmon*, 718 F.3d 369, 376 (4th Cir. 2013) (“Of course, a district court need not credit a defendant’s evidence or accept his arguments, but its findings should offer some reason why it did not.”).

3. The district court also clearly erred in finding that Mr. Wall struck Officer Hicks without addressing multiple ways the video undermined Officer Hicks’s testimony. When Mr. Wall played the A123 Vestibule Video at trial and paused it at 4:01:06, Officer Hicks believed that moment was “*the exact time*” Mr. Wall punched him. *See* JA835 (emphasis added). However, this portion of the video does not show any punch. Indeed, the magistrate judge confirmed that the video “doesn’t show it.” JA836–37.

When viewing the video alongside Officer Hicks’s testimony, it also is hard to imagine how Mr. Wall could have lifted his left arm up and struck Officer Hicks’s eye with enough force to cause it to bleed at this moment. *Cf. Doe v. Menefee*, 391 F.3d 147, 164–65 (2d Cir. 2004) (explaining that a court must “evaluate . . . testimony in light of . . . the inferences or assumptions that crediting particular testimony would require”). According to Officer Hicks, Mr. Wall was “laying” on his right

arm, with that arm “pinned,” when Mr. Wall struck Officer Hicks with the other arm. *See* JA830–32. At the time of that purported punch, the video shows Mr. Wall’s body beneath Officer Hicks (who was roughly ninety pounds heavier than Mr. Wall, *see* JA869). *See* A123 Vestibule Video at 4:01:06. Three seconds later, Officer Hicks agreed that Mr. Wall was “face down on the ground.” JA844–46 (referring to 4:01:09 of the A123 Vestibule Video). By that point however, Mr. Wall’s left arm was visibly behind his back as shown below, making it difficult to imagine how Mr. Wall plausibly could have made a forceful upward punch with that same arm just three seconds earlier while Officer Hicks had the other arm pinned.



Another portion of the video does show a plausible cause of Officer Hicks’s eye injury: a head-on-head collision with Officer Rasnick who appeared to lose his balance. The video shows the two officers coming so close together that they appear to become one blur. *See A123 Vestibule Video at 4:01:06–4:01:10.* Given Officer Hicks’s recollection of being hit “just [as he] went to [his] knees,” JA831, the district court clearly erred in treating the video as corroborative of Officer Hicks’s claim against Mr.

Wall without acknowledging that it is consistent with—if not more corroborative of—Mr. Wall’s account. *See* JA181 (Mr. Wall testifying that the three men went to the ground, Mr. Wall attempted to roll onto his stomach, and Officer Hicks secured both of Mr. Wall’s hands).

4. Next, the district court clearly erred in failing to consider video evidence that contradicts the officers’ accounts of Mr. Wall’s behavior immediately before and after he was pepper sprayed. The district court credited Sergeant Large and Lieutenant Lyall’s testimony that Mr. Wall was “unrestrained and actively resisting” when they entered the pod (at 4:01:11 and 4:01:14 of the A123 Vestibule Video). JA1326. But that has no support in the video evidence. Sergeant Large and Lieutenant Lyall testified that Mr. Wall was “swinging [his] fists and elbows,” JA937, and “wouldn’t allow himself to be restrained” when they entered the pod, JA877. But the video does not show Mr. Wall unrestrained or resisting at any point, let alone between when he is taken to the ground and when these two additional officers entered. *See* A123 Vestibule Video at 4:01:04–4:01:11. Rather, the video at 4:01:11 shows the 160-pound Mr. Wall underneath the 250-pound Officer Hicks on one side of him and Officer Rasnick on the other—restrained.

5. Video evidence also undermines the officers' accounts that Mr. Wall continued to resist after administration of the O.C. spray. Sergeant Large, for example, wrote in his incident report that Mr. Wall "was still resisting and *striking staff with his fists*" after he had been sprayed. JA1204 (emphasis added). At trial, Officer Rasnick stated that at no point in time was Mr. Wall "just laying passively on the floor [of the pod] and not moving." JA417. The A1 Pod PTZ Video contradicts these statements. Mr. Wall's white shoes and lower body are visible, and they are not moving. *See* A1 Pod PTZ Video, 4:01:36–4:02:19; *see Anderson*, 470 U.S. at 575 (explaining that an appellate court may find clear error when "objective evidence . . . contradict[s]" a witness). The district court did not acknowledge that the video undermines the officers' accounts even though, if the officers' accounts were accurate, Mr. Wall's arms should be visibly swinging and his lower body should be moving along with his upper body.

Worse still, despite ignoring how the video failed to corroborate the officers' accounts of Mr. Wall's purported resistance and punches, when the video failed to corroborate an aspect of Mr. Wall's account, the district court treated it as damaging to his credibility. *See Miller*, 720 F.2d at 366

(explaining that a district court erroneously identified “failures of recall and ambiguity” in two witnesses’ testimony without accounting for “remarkably similar failures” from another witness’s testimony, “with the greater degree of both on [the latter witness’s] side”). The district court discredited Mr. Wall by stating, in part, that “further video *shows* that [Mr.] Wall was not punched or struck while he was restrained.” JA1326 (emphasis added). But the video evidence does not conclusively “show” any such negative: The officers’ bodies block Mr. Wall from view for periods of time after Sergeant Large and Lieutenant Lyall arrived. The video evidence therefore should have rendered the officers’ testimony “at least as suspect” as Mr. Wall’s. *See Miller*, 720 F.2d at 367 (emphasis omitted).

Similarly, the magistrate judge—whose credibility determinations the district court adopted—noted that Mr. Wall’s testimony about being restrained “before the vestibule door opened allowing other officers to enter” was not consistent with video that showed a vestibule door open before the men went to the ground. *See* JA1278–79; *see also Green v. Johnson*, 515 F.3d 290, 301–03 (4th Cir. 2008) (reviewing a “magistrate judge’s pertinent findings and recommendation” after a district court

adopted them). The only possible inconsistency, however, related to when the door opened, not when the two additional officers entered and used O.C. spray on Mr. Wall's face. The A123 Vestibule Video does show one vestibule door open before Mr. Wall is on the ground, but the additional officers do not enter the pod until 4:01:11. By then, Mr. Wall had been on the ground for roughly six seconds. Two officers already had Mr. Wall pinned on the ground when the two additional officers entered. The magistrate judge never addressed these facts. Yet they make any inconsistency about when the door opened immaterial, particularly when the video never showed the "swinging . . . fists and elbows" Sergeant Large allegedly saw when he entered. *See* JA937; *Miller*, 720 F.2d at 361.

6. With no video evidence to corroborate the officers' testimony, the remainder of the district court's reasoning regarding the altercation was that all four officers "contradicted [Mr. Wall's] account on all points." JA1325–26. To the extent the district court accepted the officers' version of events and not Mr. Wall's, it offered no reason other than the video evidence. And the district court failed to address inconsistencies in the officers' testimony even apart from the video, while instead noting Mr. Wall's comparatively minor ones. This unequal treatment further reflects

the district court's flawed "fact-finding process." *See Miller*, 720 F.2d at 365–67.

For example, Officer Rasnick initially testified that he saw Mr. Wall swing and hit Officer Hicks to start the altercation, *see* JA391, before conceding he had not actually seen Mr. Wall "hit Officer Hicks," JA395. As another example, though Officer Hicks repeatedly stated that Mr. "Wall's right fist struck [him] in the right eye," *see* JA850, JA826–28, he changed his story to say it was Mr. Wall's "left arm" after seeing the video that showed the right side of Mr. Wall's body on the ground, *see* JA830–31.

The district court never addressed these inconsistencies. In fact, it never expressly found that Mr. Wall had swung at Officer Hicks to start the altercation, leaving unclear how it resolved the contested factual issue of how the altercation began. *See* JA1328 (finding "that [Mr.] Wall initiated the altercation with the officers by resisting their attempts to restrain him and escalated the conflict by striking both officers"). The district court's ambiguity on a critical fact and failure to address the inconsistencies constituted clear error. *See Brice v. Virginia Beach Corr. Ctr.*, 58 F.3d 101, 106 (4th Cir. 1995) (determining that "ambiguous

nature” of factual findings prevented proper appellate review and warranted remand); *Lewis v. Bloomsburg Mills, Inc.*, 773 F.2d 561, 577 (4th Cir. 1985) (describing a district court’s “responsibility . . . to make and record findings of fact that facially demonstrate a full consideration of the factual issues necessary to decision”).

The only aspects of either the district court or the magistrate judge’s reasoning outside the video evidence that suggested Mr. Wall was not credible were insubstantial. The magistrate judge identified two purported inconsistencies in Mr. Wall’s testimony before later discrediting Mr. Wall. The magistrate judge noted Mr. Wall’s testimony that Officer Rasnick “kept saying, ‘We got to do something about your mouth’” and apparently faulted Mr. Wall—without explaining why—for testifying about this fact out of chronological order and not explaining when Officer Rasnick made the comments. *See* JA1242.⁷ The magistrate judge also stated that, though Mr. Wall’s complaint “alleged that [Officer] Rasnick . . . punch[ed] [Mr.] Wall in the left side of his face,” JA1278, Mr.

⁷ No one asked a follow-up question. *See* JA260–61. As for precisely when Officer Rasnick made the comments, Mr. Wall wrote shortly after the altercation that Officer Rasnick made them when Officer Hicks told Mr. Wall to go to the vestibule. *See* JA713.

Wall “said nothing [during trial testimony] about [Officer] Rasnick punching him in the left side of his face,” JA1278–79. But, although Mr. Wall did not specify the left side in his trial testimony, he consistently testified that Officer Rasnick grabbed him and hit him on the head to start the altercation. *See* JA181; JA280; JA304–08.

The district court’s erroneous fact-finding regarding the altercation in the Alpha Building contaminated its analyses of Officers Hicks and Rasnick’s counterclaims as well as Mr. Wall’s claims against both officers, Sergeant Large, and Lieutenant Lyall. The district court’s judgment on each claim rested on the same findings. *See* JA1325–26; JA1328–29; JA1278–81; JA1283–86. Accordingly, this Court should reverse the judgment on these claims and remand for proper fact-finding.

B. This Court should reverse the judgment on Mr. Wall’s claims against the officials who placed him in five-point restraints and a spit mask without decontamination for several hours.

The district court also clearly erred in concluding that Mr. Wall failed to demonstrate excessive force and deliberate indifference by Lieutenant Lyall and Sergeant Large as well as the other defendants responsible for the abuse Mr. Wall suffered after the altercation (Lieutenant Collins; Officers Akers, Taylor, Bishop, James Testerman,

Michael Addington, Cody Dockery, Edward Gwinn, Adam Mullins; Nurse Deel; and Warden Barksdale). *See* JA1326–28; JA1272; JA1278–84. The district court’s denial of these claims turned on the decision to discredit Mr. Wall’s testimony in its entirety and to credit the testimony of officers and a nurse. JA1326–28. Those credibility determinations and subsequent findings were clearly erroneous, both because they were tainted by the erroneous findings discussed above and because of the district court’s failure to account for video and documentary evidence to the contrary discussed below.

The district court determined that Mr. Wall failed to prove the subjective elements required for excessive force and deliberate indifference. *See* JA1325–28. Officers use excessive force when they apply force “maliciously and sadistically to cause harm,” rather than as part of “a good-faith effort to maintain or restore discipline.” *Iko v. Shreve*, 535 F.3d 225, 239 (4th Cir. 2008) (quoting *Hudson v. McMillian*, 503 U.S. 1, 7 (1992)). They exhibit deliberate indifference to serious medical needs by having “actual knowledge of [a] risk of harm” and “recogniz[ing] that [their] actions were insufficient’ to mitigate the risk of harm to [an]

inmate arising from his medical needs.” *Id.* at 241 (quoting *Parrish ex rel. Lee v. Cleveland*, 372 F.3d 294, 303 (4th Cir. 2004)) (emphases omitted).⁸

The district court clearly erred on the subjective elements when it discredited Mr. Wall and credited Sergeant Large and Lieutenant Collins’s testimony that Mr. Wall was conscious at all times “and refused to answer them when they asked if he required decontamination [from the O.C. spray].” *See* JA1326–27. It considered their account to be corroborated by Nurse Deel’s testimony and the fact that no video showed Mr. Wall with “typical symptoms associated with O.C. spray” or “request[ing] any decontamination . . . despite being asked if he had any complaints for the nurses to address.” JA1327. Yet, again, the district court failed to address video and documentary evidence that conflicted with the officials’ testimony and corroborated Mr. Wall’s. *See Anderson*, 470 U.S. at 575.

1. Both Sergeant Large and Lieutenant Collins’s testimony is inconsistent with video evidence that corroborates Mr. Wall’s testimony that he lost consciousness in the Alpha Building pod and only regained it

⁸ Both deliberate indifference and excessive force have objective components, which the district court correctly assumed had been satisfied here. *See* JA1327–28; JA1278.

outside. *See* JA183–84. Sergeant Large testified to having asked Mr. Wall if he “needed O.C. decontamination” when other officers were “escorting [Mr. Wall] out” of the Alpha Building vestibule, but that Mr. Wall “didn’t respond at all.” JA938. Sergeant Large added that Mr. Wall “was being combative all the way out” of the Alpha pod and that Mr. Wall “went to the floor once, maybe twice as he was refusing to walk . . . pushing back against [the officers].” JA944–45; *see also* JA944–45 (“He was just being totally out of control.”). And Lieutenant Collins testified that Mr. Wall walked “erect” between the Alpha and Bravo Buildings. *See* JA917; *see also* JA1261. This testimony is inconsistent with the video evidence.

One video shows Mr. Wall being carried in a horizontal position out of the Alpha Building pod. *See* A123 Vestibule Video 4:02:35–4:02:43.



The A123 Entrance Video captured the next moments, in which officers carried Mr. Wall's body out of the building. Mr. Wall's bright white shoes never even touch the floor. *See* A123 Entrance Video 4:02:52–4:02:56. At no point does either video show Mr. Wall walking, “combative,” or “out of control” of the officers who were carrying his body. *Cf.* JA944–45.



A123 Entrance





The district court did not address this video evidence or inconsistency about Mr. Wall's exit from the Alpha Building. Instead, it focused on video of Mr. Wall after he arrived at the Bravo Building and

was taken to a cell. *See* JA1327–28.⁹ But, once Mr. Wall reached the cell, that video does not show Mr. Wall moving or speaking, consistent with his testimony that he lost consciousness shortly after officers applied a spit mask. *See* Handheld Video, 7:28–17:53; JA190; JA323.

2. Without discussing the video evidence at odds with the officers’ account, the district court noted that Nurse Deel corroborated that account. JA1327. Nurse Deel, however, was in the Bravo Building cell for less than ninety seconds. *See* Handheld Video 16:08–17:29. And she later reported only “scattered bruising” and “[n]ose bleeding when [she] arrived.” *See* JA966–67; JA970–72; JA496–98. The district court did not address the inconsistency between Nurse Deel’s report of minor injuries and a report from Wallens Ridge later that evening documenting injuries to Mr. Wall’s face, head, ribs, shoulder area, and wrists that led staff to call a doctor, who ordered x-rays of Mr. Wall’s “skull,” “facial bones,” and left hand. *See* JA499–500.

⁹ Although Lieutenant Collins testified that Mr. Wall made threats to harm staff both outside and within the Bravo Building, *see* JA890, JA896–97, no threats can be heard on the video, which began when Mr. Wall was out of the camera’s view and surrounded by officers, *see* Handheld Video at 0:01–0:20. And Mr. Wall was “in handcuffs and leg irons.” JA889.

Absent the district court’s clear fact-finding errors (all of which cut only in the direction of erroneously crediting the defendants), Mr. Wall demonstrated excessive force and deliberate indifference. The officers placed him in five-point restraints and a spit mask for roughly three hours without decontamination, despite knowing he had been O.C.-sprayed and lost consciousness. *See* JA928 (Lieutenant Collins testifying that “the procedure, including . . . the refusal of medical [treatment] and decontamination,” “should be recorded”). And “it is undisputed that [Mr. Wall] received no medical treatment whatsoever” at Red Onion. *See Iko*, 535 F.3d at 242 (emphasis omitted); JA1280. This Court should reverse and remand for the district court to properly assess the evidence for Mr. Wall’s excessive force and deliberate indifference claims.¹⁰

III. Officer Rasnick failed to present sufficient evidence to prove assault and battery.

Although this Court should remand Officer Hicks’s assault and battery counterclaims and Mr. Wall’s claims for the reasons discussed above, it should reverse the decision that Officer Rasnick proved assault

¹⁰ Because the district court denied Mr. Wall’s bystander liability claims on the same ground as these Eighth Amendment claims, the district court should address those claims anew on remand. *See* JA1281.

and battery and order the entry of judgment against him. Addressing Officer Rasnick’s counterclaims together with Officer Hicks’s, the district court found that Mr. Wall “initiated the altercation with the officers by resisting their attempts to restrain him and escalated the conflict by *striking both* officers.” JA1328 (emphasis added). The district court concluded “[t]his [wa]s assault and battery in its plainest form.” JA1328. But the district court clearly erred in finding that Mr. Wall “str[uck]” Officer Rasnick. *See* JA1328. And it made a mistake of law by conflating the separate torts of assault and battery in deciding Mr. Wall committed both. Because of these errors, and because Officer Rasnick failed to present sufficient evidence for either of these counterclaims, this Court should reverse and conclude that “the record permits only one resolution”: that Mr. Wall neither battered nor assaulted Officer Rasnick. *See United States v. Watson*, 793 F.3d 416, 429 (4th Cir. 2015) (quoting *Pullman-Standard v. Swint*, 456 U.S. 273, 292 (1982)).

The district court did not identify any evidence that Mr. Wall intentionally touched or struck Officer Rasnick for purposes of battery, and the record has none. Battery requires proof of an “act intend[ed] to cause a harmful or offensive contact” with another person, “or an

imminent apprehension of such a contact,” and that “directly or indirectly results” in such a contact. Restatement (Second) of Torts § 13 (Am. Law Inst. 1965); *see also Koffman v. Garnett*, 574 S.E.2d 258, 261 (Va. 2003). Recovery of compensatory damages is limited to “the injuries directly flowing from the tort, and for all detriment proximately caused by the defendant’s wrongful act.” 6 Am. Jur. 2d Assault and Battery § 131 (2021) (footnotes omitted).

But Officer Rasnick did not testify that Mr. Wall struck him or that his knee injury resulted from contact with Mr. Wall. In fact, when asked by his attorney whether he recalled having been “struck or hit or anything else during the struggle,” Officer Rasnick responded: “No.” JA417; *see also* JA426–27. Officer Rasnick testified only that he “twisted [his] right knee and tore [his] meniscus” “as a result of this incident.” JA396; JA416. The district court therefore clearly erred in finding that Mr. Wall “str[uck]” Officer Rasnick. *See* JA1328. And Officer Rasnick’s own testimony demonstrates that he did not experience any harmful or offensive touching for purposes of holding Mr. Wall liable for battery and the knee injury.

When the district court then described Mr. Wall's acts as "assault and battery in *its* plainest form," JA1328 (emphasis added), the district court made a mistake of law: The court conflated "two independent torts" and failed to identify any factual basis for the separate tort of assault. *See Koffman*, 574 S.E.2d at 261. Assault requires "an act intended to cause either harmful or offensive contact with another person or apprehension of such contact, and that creates in that other person's mind a reasonable apprehension of an imminent battery." *See id.* (citing Restatement (Second) of Torts § 21 (Am. Law Inst. 1965)).

But Officer Rasnick did not present evidence that he was in apprehension of an imminent battery resulting from an intentional act by Mr. Wall or that such an act caused his knee injury. Without testimony of a "subjective recognition or apprehension that [he] wa[s] about to be touched in an impermissible way," Officer Rasnick failed to present "the core of [his] assault claim." *See* Dan B. Dobbs et al, *The Law of Torts* § 38 (2d ed.). Officer Rasnick testified that Mr. Wall "jerked away from [him]" when he "grabbed [Mr. Wall's] right wrist," after which Officer Rasnick "tried to grab [Mr. Wall] . . . around [the] waist to take [Mr. Wall] to the ground." *See* JA395; JA397. And Officer Rasnick did not

explain how he apprehended an imminent battery when he and Officer Hicks tackled Mr. Wall to the ground. *See* JA397–98; JA414.

Absent any apprehension of imminent touching, whatever caused Officer Rasnick to twist his knee was not “a legal consequence of the apprehension,” and therefore was not remediable “as part of the damages recoverable in the action brought for . . . assault.” *See* Restatement (Second) of Torts § 21, Cmt. c. (Am. Law Inst. 1965); *see also Bowie v. Murphy*, 624 S.E.2d 74, 80 (Va. 2006) (noting that “the resulting injury from assault is that the ‘threatening gesture, creating the apprehension, is ... actionable without actual damage. It is, in effect, a form of *mental* injury which is being compensated.”) (quoting Charles E. Friend, *Personal Injury Law in Virginia*, 6.3.1 at 183 (3d ed. 2003)) (emphasis in original). The district court therefore made an error of law by conflating assault and battery, and the record does not contain sufficient evidence for either tort. *See Watson*, 793 F.3d at 429.

Accordingly, this Court should reverse and order the entry of judgment against Officer Rasnick on these claims.

CONCLUSION

For the foregoing reasons, this Court should reverse and remand this case for the district court to conduct a proper spoliation analysis and further proceedings in light of that analysis. In addition, this Court should reverse and remand the case for a proper view of the video evidence and a reasoned weighing of the evidence. Finally, this Court should reverse and order the entry of judgment against Officer Rasnick on his assault and battery counterclaims.

STATEMENT REGARDING ORAL ARGUMENT

Mr. Wall respectfully requests oral argument pursuant to Federal Rule of Appellate Procedure 34(a) and Fourth Circuit Local Rule 34(a). Oral argument will allow this Court to ensure the proper application of federal spoliation law when prison officials fail to preserve video footage, in addition to the correct standards regarding judicial fact-finding in light of video evidence. Oral presentation also would aid this Court's resolution of this case's fact-intensive issues that followed a two-day bench trial.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 11,764 words excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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CERTIFICATE OF SERVICE

I, Joshua Marcin, certify that on January 3, 2022, I electronically filed the foregoing brief with the Clerk of the Court for the Fourth Circuit using the CM/ECF system, which will send notice of such filing to counsel of record in the above-captioned case.

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