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

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APPELLANT'S REPLY BRIEF

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Defendants envision a different record than this case actually presents, one more favorable to them at every turn. And, relying on that vision, they disregard the district court's actual decision-making. Properly viewing the record—and what is missing from it—should lead this Court to recognize both the district court's abuse of discretion in denying spoliation sanctions and its clearly erroneous factual findings based on the few videos Defendants and DOC preserved.

Defendants begin with procedural reasons why this Court should not address the destruction of numerous videos after Mr. Wall requested their preservation pursuant to DOC policy. None of these reasons withstand scrutiny. Mr. Wall filed a timely and specific objection to the magistrate judge's cursory spoliation order. Rather than attempt to explain the district court's silence on that objection, Defendants ask this Court either to ignore that silence because Mr. Wall did not file a post-judgment motion before appealing or to affirm based on reasons the district court never gave. Neither option can be squared with this Court's precedent. Nor can Defendants undo the reversible errors that prevented

a proper exercise of discretion and the imposition of sanctions against each Defendant.

Defendants then state that the district court based its factual findings on witnesses' reports and demeanor. Wrong. The district court placed dispositive weight on a clearly erroneous view of the remaining video. And Defendants similarly ask this Court to see things the video does not show. All Mr. Wall seeks is a fair review of the video and the district court's critical findings—not speculation about what the former might show or the latter could have been.

Officer Rasnick then provides his own newly-minted version of events. His brief states that Mr. Wall deliberately touched him after being taken to the ground, constituting sufficient evidence to prove a battery. But the brief filed by Officer Rasnick's lawyers cannot negate his testimony about not having been "struck or hit or anything else during the struggle[.]" JA417. Neither Officer Rasnick nor his lawyers can rewrite the trial testimony or the district court's clearly erroneous findings that followed it.

I. Defendants never justify the district court's silence regarding Mr. Wall's motion for spoliation sanctions.

Missing almost entirely from Defendants' brief is a defense of the magistrate judge's spoliation order and the district court's failure to say a word about it. Defendants wrongly attack the timeliness and specificity of Mr. Wall's objection, then posit reasons to deny sanctions that the district court never gave and that have no basis in the record or spoliation law. This Court should reject these attempts to deflect attention from the district court's reversible errors and remand for a proper exercise of discretion.

A. Defendants cannot explain the district court's failure to address Mr. Wall's timely and specific objection.

At no point do Defendants argue that the district court actually considered Mr. Wall's objection to the spoliation order. Defendants first argue that this Court should not review any issue regarding spoliation because Mr. Wall's objection was not timely or sufficiently specific. They are wrong on both counts. Second, Defendants argue that, to the extent the district court abused its discretion by not even considering the objection, Mr. Wall failed to preserve this error for appeal because he did

not present it in a post-judgment motion for reconsideration. That is not the law.

1. Mr. Wall's objection was timely and specific.

Mr. Wall's objection to the magistrate judge's spoliation order was due within fourteen days of service of that order. *See* Fed R. Civ. P. 72(a). Defendants argue that the deadline was fourteen days after May 13, 2019, and that Mr. Wall did not file until sixteen days later (on May 29, 2019). *See* Response Br. at 20 & n.3, 28–30 (treating the date the filing was "marked stamped and received in the prison mailroom" as the filing date); *see also Felton v. Bell*, 19 F.3d 1428, 1428 (4th Cir. 1994) (unpublished) (applying prison mailbox rule to Fed. R. Civ. P. 72 objections). Defendants are wrong about both dates.

Defendants are wrong about the deadline because the spoliation order was served on Mr. Wall by mail, triggering Federal Rule of Civil Procedure 6 and adding three days to the deadline. *See* Fed R. Civ. P. 6(d); *Daker v. Comm'r, Ga. Dep't of Corr.*, 820 F.3d 1278, 1286 (11th Cir. 2016). And Defendants are wrong about the filing date because the filing's certificate of service states that Mr. Wall mailed it on May 27. *See* JA1297; *see also United States v. Perry*, 595 F. App'x 252, 253 n.1 (4th

Cir. 2015) (treating date on signed certificate of service as the operative one). Viewed properly, Mr. Wall had until May 30 to object and did so on May 27. Even the filing date Defendants use, May 29, shows the objection was timely.

And the objection was sufficiently specific. Fairly construed, it "reasonably . . . alert[ed] the district court of the true ground for [Mr. Wall's] objection" to the spoliation order. *See Martin v. Duffy*, 858 F.3d 239, 245 (4th Cir. 2017) (quoting *United States v. Midgette*, 478 F.3d 616, 622 (4th Cir. 2007)). Mr. Wall objected to the "denial of ECF No. 75 & 77"—ECF No. 77 was Mr. Wall's spoliation motion. *See* JA10; JA1296; *see also* JA110. The objection to the spoliation order began on page five of a filing that *also* included objections to a report and recommendation the magistrate judge had mailed four days after mailing the spoliation order. To the extent Defendants read the title of the filing as a whole to indicate Mr. Wall was objecting only to the report and recommendation, they are wrong. *See* Response Br. at 29. The title on the first page of the filing referred to the report and recommendation. JA1292–96. Reading that first page to negate the substance of the subsequent title and section "also object[ing] to [the] denial" of Mr. Wall's motion for spoliation

sanctions misconstrues—rather than liberally construes—the objections. *See* JA1296–97; *cf. Castro v. United States*, 540 U.S. 375, 381–82 (2003) (explaining that courts may "avoid inappropriately stringent application of formal labeling requirements" by "recharacteriz[ing]" pro se filings based on their substance (citations omitted)); *Martin*, 858 F.3d at 245–46 (liberally construing a pro se objection).

Defendants also mischaracterize Mr. Wall's spoliation objection by reading it to contend only that certain videos had been altered. *See* Response Br. at 29. Mr. Wall's objection rested not only on alleged alteration of videos but also on Defendants' failure to preserve other videos. He challenged the magistrate judge's ruling that he had not made "specific" requests for preservation. *See* JA1297 (Mr. Wall stating that he had "referenced" "'specific' video footage," "triggering a [d]uty to preserve according to VDOC's policy"); *see also* JA1223 (magistrate judge's order concluding that Mr. Wall had not made "*specific* requests that the [D]efendants preserve additional video recording evidence" (emphasis added)). In doing so, Mr. Wall cited "Plf No. 23"—his original set of requests that Defendants and DOC preserve video evidence, including video that everyone at trial agreed was not preserved despite Mr. Wall's

requests. *See* JA1297; JA1178–79; JA110–15; Opening Br. at 13–18. And in further "support," he attached DOC's policy that required the video's preservation. *See* JA1297; *see also* JA1307 ("If a grievance is received that references a specific audio or video recording, a copy of the recording shall be made and maintained at the facility."); *Martin*, 858 F.3d at 245–46 (reading—and liberally construing—a pro se objection together with an attachment). Fairly construed, Mr. Wall's objection argued that Defendants and DOC breached a duty to preserve the videos Mr. Wall had requested.

Defendants also suggest that Mr. Wall's objection was insufficient because he did not specifically "argue that he was prejudiced by the absence of other video evidence at trial." *See* Response Br. at 29. But the magistrate judge's order said nothing about prejudice. *See* JA1223. Particularly as a pro se litigant, Mr. Wall did not need to say anything more about it. *See Allen v. D.C.*, 969 F.3d 397, 402 (D.C. Cir. 2020) (explaining that a party "did not need to object to something that [a] magistrate judge had not recommended"). And Mr. Wall already had explained in his spoliation motion (which he cited in his objection) that

the failure to preserve "severely prejudice[d] [his] ability to prove" his case. *See* JA111–14.

2. Mr. Wall was not required to seek reconsideration after the district court failed to address his objection.

Defendants then raise a procedural defense to Mr. Wall's argument that the district court abused its discretion by failing to consider Mr. Wall's objection. According to Defendants, Mr. Wall needed to alert the district court to this error before filing this appeal. Response Br. at 31–33. That is wrong.

Defendants rely on precedent requiring a party to raise a trial court's "oversight or omission" of an issue when the court issues a "ruling that does not mention" the issue. *See Malbon v. Pa. Millers Mut. Ins. Co.*, 636 F.2d 936, 941 (4th Cir. 1980). Yet that precedent does not apply when the district court's omission only becomes evident in a final order ending the proceedings, as occurred here. In *Malbon*, a trial court issued an order "over four months before [a] trial began" that specifically addressed only one of two issues a set of plaintiffs had raised regarding their demand for a jury trial. *See id.* at 939–41. But the plaintiffs waited to raise the trial court's potential "oversight" until appeal, when this Court declined to reach it. *Id.* at 940–41. Mr. Wall, in contrast, only learned of the district

court's failure to address his objection upon receipt of the district court's final order and judgment, which triggered his thirty-day deadline to appeal. *See* Fed. R. App. P. 4(a)(1)(A). He promptly appealed.

Defendants cite no case in which this Court required a litigant to file a post-judgment reconsideration motion after a final order did not address an issue and before appealing. In fact, without mentioning any such requirement, this Court has remanded when "unable to satisfy [itself]" that a district court considered "crucial matters." *See In re Steve A. Harris, Inc. v. Kenyon Oil Co.*, 63 F. App'x 668, 670 (4th Cir. 2003); *see also Whittle v. Timesavers, Inc.*, 749 F.2d 1103, 1106 (4th Cir. 1984) (reversing and remanding a summary judgment order that "did not adequately discuss" a critical issue). If this Court agrees that the district court did not consider Mr. Wall's objection, it should reverse and remand for the district court to address the objection and the spoliation order. *See* Opening Br. at 26–27.

B. Assuming the district court actually considered Mr. Wall's objection, Defendants cannot defend the district court's silence regarding the magistrate judge's errors.

Defendants alternatively argue that, if the district court "impliedly considered" Mr. Wall's objection to the spoliation order, this Court still

should affirm. Response Br. at 33–34. But Defendants provide no meaningful defense of the order. And to the extent Defendants present grounds to affirm that appear nowhere in the decisions below, this Court should decline to address them in the first instance or reject them as meritless.

1. Defendants repeat the magistrate judge's errors.

Like the magistrate judge, Defendants argue that Mr. Wall's informal complaint and regular grievance—through which he requested that Defendants and DOC preserve video evidence—were not specific enough "to trigger a duty to preserve" videos from the Alpha and Bravo Building recreation yard cameras under Rule 37. Response Br. at 39–40. Defendants make the same point to argue that any breach "was negligent, at best." Response Br. at 42. Why? According to Defendants, because the requests contained "no specifics" about those videos' relevance, such as "allegations of being 'rammed' into walls and poles." Response Br. at 38–39, 42. Yet each request specifically referenced not only cameras in the Alpha Building, but also recreation yard cameras outside the Alpha and Bravo Buildings, Bravo vestibule and pod cameras, and the camera in Bravo cell 308. JA1178–79. Mr. Wall sought review of

all those videos to show that he was "repeatedly punched & kicked, and [his] fingers were bent to the point [his] hand was fractured," force that "continued until [he] reached" a pod in the Bravo Building. JA1178–79; *see also* JA1179 (seeking compensation for "excessive force" and "cruel and unusual punishment"). Anyone reading these requests "reasonably should know" that the videos Mr. Wall identified "may be relevant to anticipated litigation," triggering a duty to preserve them. *See Silvestri v. Gen. Motors Corp.*, 271 F.3d 583, 591 (4th Cir. 2001); *see also* Fed. R. Civ. P. 37(e).

In fact, Defendants never dispute that the requests were specific enough to trigger DOC's obligation to preserve each video under its own policy. *See* Response Br. at 40. Defendants only note that the policy—and a violation of it—"does not necessarily" establish duty and breach for purposes of spoliation. Response Br. at 40 (quoting Fed. R. Civ. P. 37 advisory committee's note to 2015 amendment). That may be true as a general matter. But here, the policy can—and did—demonstrate that Defendants and DOC reasonably should have anticipated litigation arising out of Mr. Wall's grievances that identified specific videos for preservation. *See Harvey v. Hall*, No. 7:17-CV-00113, 2019 WL 1767568,

at *5 (W.D. Va. Apr. 22, 2019) (concluding that Red Onion Prison officials' duty to preserve was triggered when an official responded to an inmate's grievance that "expressly 'referenced' a specific video recording"). The policy itself referred to potential litigation; it required DOC to preserve videos for three years or longer in the event of ongoing "investigation or *litigation*." JA1311 (emphasis added); JA116. Defendants also fail to grapple with additional evidence that made litigation reasonably foreseeable, including the seriousness of the incident and SIU's investigation that began within weeks of the incident (during which Mr. Wall described having been rammed into poles and doorways, JA712–16). *See* Opening Br. at 28–30.

For the first time in this litigation, Defendants appear to question whether video from between the Alpha and Bravo Buildings even "existed." *See* Response Br. at 38. But these questions are belied by Defendants' concession to the magistrate judge that such video evidence "wasn't preserved." *See* JA1115–16. And Defendants do not seriously contest what was uncontested below: that "someone" at DOC reviewed video footage "while it still existed and saved portions of it and didn't save

all of it." JA1117. That selective destruction constituted breach of the duty to preserve. Opening Br. at 30–31.

Defendants cannot justify the magistrate judge's clearly erroneous determinations that Mr. Wall's requests "that the [D]efendants preserve additional video" were not "timely" or "specific" and that "the video evidence which [he] had requested was preserved and presented at trial." *See* JA1223. These errors by themselves warrant reversal.

Beyond that set of errors, Defendants barely address the magistrate judge's additional erroneous statement that Mr. Wall did not present evidence of bad faith. Defendants suggest that negligent losses do not constitute spoliation. *See* Response Br. at 41. But that does not respond to Mr. Wall's argument that he showed evidence of willful, prejudicial, and bad-faith destruction. *See* Opening Br. at 31–35. And Defendants' citation to *Turner v. United States*, 736 F.3d 274, 282 (4th Cir. 2013), ignores that the current Rule 37(e) permits sanctions for failures "to take reasonable steps to preserve" evidence, including negligent losses. *See* Fed. R. Civ. P. 37(e); *see also* Fed. R. Civ. P. 37 advisory committee's note to 2015 amendment ("limit[ing] the most severe [sanctions] to" intentional losses).

In sum, Defendants have not adequately addressed either set of reversible errors in the only reasoning the district court could have adopted: the magistrate judge's. This Court should reverse and remand, leaving a proper exercise of discretion under Rule 37 to the district court in the first instance. *See Scott v. Fam. Dollar Stores, Inc.*, 733 F.3d 105, 112, 117–19 (4th Cir. 2013) (reversing and remanding after district court relied on errors of law and fact when exercising its discretion).

2. Defendants' remaining arguments merely show the need to remand for a proper spoliation analysis against each Defendant.

None of Defendants' other arguments appear in the decisions below. This Court should decline to address them now, instead leaving them to the district court's discretion. *See Blue Sky Travel & Tours, LLC v. Al Tayyar*, 606 F. App'x 689, 698 (4th Cir. 2015) (leaving "unresolved issues" that were "essential to [a] spoliation analysis" to a district court on remand). If this Court does address these arguments, it should reject them as meritless.

a) This Court should not adopt Defendants' bright-line rule against imputation.

Defendants correctly observe that courts may impute a non-party's spoliation to a party in some circumstances, for instance, to sanction an

employer after an employee's spoliation. Response Br. at 43, 49–50. But Defendants argue that sanctions are inappropriate unless Mr. Wall proved that a party personally was aware of potential litigation, could "access or otherwise preserve" evidence, and "failed to take reasonable action" to do so. Response Br. at 36–42. Defendants thereby ask for a bright-line rule against ever imputing DOC's anticipation of litigation, control over evidence, and destruction of that evidence to prison staff. But Defendants' rule is inconsistent with the fact-intensive imputation analyses this Court and others entrust district courts to perform. *See* Opening Br. at 35–36.

Defendants ask to apply their bright-line rule because "all that exists" between them and DOC is "the general employer-employee relationship." Response Br. at 43. Yet Defendants disregard what makes the relationship unique. *See* Opening Br. at 36–37. DOC cannot be sued. So treating DOC like any private employer when DOC—unlike those employers—cannot be held accountable for spoliation risks what the Sixth Circuit called "a justifiable concern": that DOC would have "an incentive to destroy evidence that is damaging to its employee's case."

Adkins v. Wolever, 692 F.3d 499, 506 (6th Cir. 2012).[1] On top of that, Defendants are represented by the Virginia Attorney General's Office.[2] And DOC controlled the grievance process through which Mr. Wall sought to preserve each video, JA1122–23, and can "spread" "the responsibility for preserving evidence" throughout an institution. *Muhammad v. Mathena*, No. 7:14-CV-00529, 2016 WL 8116155, at *7 (W.D. Va. Dec. 12, 2016).

Instead of Defendants' rule, this Court should continue to allow district courts to approach questions of imputation on a case-by-case basis, permitting fact-intensive inquiries to decide whether to impute a state prison's spoliation to prison staff. *Silvestri* illustrated this type of

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[1] Although Defendants allude to "Eleventh Amendment concerns," Response Br. at 50, imposing a spoliation sanction against individuals in this case would not create any. *See Pettit v. Smith*, 45 F. Supp. 3d 1099, 1109 (D. Ariz. 2014) (explaining that the Eleventh Amendment would be implicated only if a sanction "would effectively establish [a] [s]tate's violation of [a party's] constitutional rights and subject it to an award of damages for that violation").

[2] Defendants state they have "no indemnification relationship" with DOC, Response Br. at 43, but do not foreclose the possibility of indemnification by the Commonwealth. *See* VA. CODE ANN. § 2.2-1837(A)(1)(a) (directing Division of Risk Management to establish a plan that provides "[p]rotection against liability" for Commonwealth employees "acting in an authorized governmental . . . capacity and in the course and scope of employment or authorization").

approach when it rejected the argument that a party needed to either control evidence or have one's agent be "engaged in the destruction of the evidence" before a district court could sanction that party. *See Silvestri*, 271 F.3d at 591–92; *see also id.* (affirming sanctions even though a party did not "control" evidence—it "belonged to [the party's] landlady's husband"—and relying on the fact that the party had access to it); *Adkins*, 692 F.3d at 506 (viewing a case-by-case approach to imputation as a "prudent path"). District courts are well equipped to consider factors like the nature of a party's relationship with DOC, whether the party had reason to know about the existence or destruction of evidence, the extent to which the party benefits—or another party is prejudiced—from spoliation, the party's position in the chain of command at a prison, and effects on "the integrity of the judicial process," *Silvestri*, 271 F.3d at 590. *See Johns v. Gwinn*, 503 F. Supp. 3d 452, 462–64 (W.D. Va. 2020); *Pettit*, 45 F. Supp. 3d at 1106, 1110–11. Defendants' assertion that many district courts have limited sanctions to officers who personally controlled evidence, Response Br. at 50, does not explain why this Court should mandate that approach in every single case.

This Court has not adopted Defendants' rule, and Defendants are wrong to suggest that *Boone v. Everett*, 751 F. App'x 400 (4th Cir. 2019) (per curiam), is relevant. *See* Response Br. at 43–45. In *Boone*, a defendant credibly testified that he thought a video had been preserved, and there was no evidence of willful destruction—unlike Mr. Wall's evidence of conscious, selective destruction. *See Boone*, 751 F. App'x at 402. This Court had no occasion to address imputation in *Boone*. In fact, the defendant (represented by the Attorney General's Office) told this Court that the plaintiff "abandoned any imputed-liability argument on appeal." *Boone v. Everett*, No. 18-6094, Doc. 25, Appellee's Br. at 2 (filed Sept. 21, 2018).

Nor does Rule 37 reflect Defendants' bright-line rule. The Rule permits sanctions against "a party" who had a duty to preserve evidence and "failed to take reasonable steps to" do so. Fed R. Civ. P. 37(e). And the Advisory Committee Notes give an example of information outside a "party's control" as one time a loss "occurs despite the party's reasonable steps to preserve." *See* Fed R. Civ. P. 37 advisory committee's note to 2015 amendment. Yet the Rule "does not itself define when a duty to preserve arises or what constitutes reasonable steps sufficient to meet that duty."

1 Federal Rules of Civil Procedure, Rules and Commentary, Rule 37. It leaves such questions "to the developing common law of preservation," *id.*, and thereby leaves intact the case-by-case approach to imputation this Court and others have long recognized. *See Silvestri*, 271 F.3d at 591–92 (affirming sanction against a party who did not "even control" evidence "in a legal sense" after an incident that eventually led to litigation); *see also Adkins*, 692 F.3d at 506. In Mr. Wall's case, the magistrate judge's errors prevented the fact-intensive analysis the Rule requires. And the record contains no findings about who at DOC had control over the destroyed videos in any sense. *Cf. Stanbro v. Westchester Cnty. Health Care Corp.*, No. 19-civ-10857, 2021 WL 3863396, at *11–12 (S.D.N.Y. Aug. 27, 2021) (defining "control" in spoliation context to include consideration of a party's "practical ability to obtain evidence from another entity" and relationship with that entity).

This Court should remand for a proper spoliation analysis with regard to each Defendant and all of Mr. Wall's claims. The magistrate judge and district court evaluated Defendants' credibility as a group, simply asking whether they corroborated one another and were corroborated by the selectively preserved video. *See, e.g.*, JA1280

(magistrate judge stating: "[E]very officer who was present that day and who testified at trial stated that they did not see any officer punch, hit or kick [Mr.] Wall at any time."); JA1325–28 (district court adopting magistrate judge's findings). An adverse inference against any single Defendant—or even a measure of skepticism applied to the curation of the video evidence—would have undermined the collective credibility determinations and led to a different conclusion on any or all of Mr. Wall's claims.

b) This Court should remand for a prejudice determination by the district court in the first instance.

Defendants last argue that "there is no error in the judgment below" because Mr. Wall failed to "establish" prejudice from "the missing evidence." Response Br. at 52. But the district court never placed the burden on Mr. Wall to show prejudice. And even if it had, Mr. Wall showed both prejudicial destruction as well as bad faith, justifying sanctions up to and including an adverse inference. *See* Opening Br. at 31–35.

Rule 37 "does not place a burden of proving or disproving prejudice on one party or the other." Fed. R. Civ. P. 37 advisory committee's note to 2015 amendment. Instead, the district court has "discretion to

determine how best to assess prejudice." *Id.* That discretionary determination is for the district court to make in the first instance. *Cf. Micron Tech., Inc. v. Rambus Inc.*, 645 F.3d 1311, 1328 (Fed. Cir. 2011) (remanding when "[t]he proper resolution of [spoliation sanctions] turns largely on" which party has the burden regarding prejudice).

In any event, Mr. Wall has shown prejudice. All he needed to show were "plausible, concrete *suggestions* as to what [the destroyed] evidence *might have been*." *Id.* (emphases in original) (quoting *Schmid v. Milwaukee Elec. Tool Corp.*, 13 F.3d 76, 80 (3d Cir. 1994)). He did so. And even the magistrate judge recognized his "powerful argument" that one set of videos would have "shown or not shown him run into poles." JA1116. Defendants now question technical details about the cameras he identified, like their precise location and whether they were "operational." Response Br. at 53. But Defendants already conceded that recreation yard video "wasn't preserved." JA1116. And Defendants themselves named the cell in which they placed Mr. Wall a "camera cell," JA893, plus never contested that the Bravo Building had a camera in the vestibule area, just like the Alpha Building. *See* JA110–11 (spoliation motion listing that video as unpreserved).

Independent of prejudice, the selective destruction in this case showed bad faith, a point Defendants never meaningfully address. *See supra* Section I.B.1. And bad-faith destruction allowed for the most extreme sanctions, including an adverse inference, without requiring a separate prejudice finding. *See* Fed. R. Civ. P. 37(e)(2).

Defendants cannot rewrite the record or erase Mr. Wall's showing about each missing video. Nor can they seriously contest that appropriate sanctions would have altered every dispositive finding in this credibility-centered case.

II. Defendants rely on incorrect views of both the district court's fact-finding and the preserved videos.

Defendants paint a picture of the district court's fact-finding that does not comport with the record. They skirt the magistrate judge and district court's only stated basis for crediting Defendants over Mr. Wall—the preserved videos. And they ask this Court to defer to demeanor-based credibility determinations without identifying a single one. In so doing, Defendants fail to rebut Mr. Wall's argument that the district court based every credibility determination on a manifestly flawed view of the video evidence.

A. Defendants sidestep the sole basis for the findings about the altercation in the Alpha Building—an erroneous view of the video.

According to Defendants, the magistrate judge and district court based their credibility determinations on "all of the evidence presented—not just the surveillance video" and "handheld video." Response Br. at 56. And Defendants ask this Court to affirm those credibility determinations as plausible on this record. Response Br. at 58–59. But Defendants give no examples of the magistrate judge or district court relying on anything other than the video. And Defendants fail to respond to numerous examples of the district court erroneously using that video to credit Defendants' account about what happened in the Alpha Building without accounting for substantial evidence that corroborated Mr. Wall.

Mr. Wall is not asking this Court to supplant the district court as fact-finder. He simply asks this Court to recognize that "several mistakes in [the district court's] fact-finding process render[ed] [its] critical findings of fact clearly erroneous." *See Miller v. Mercy Hosp., Inc.*, 720 F.2d 356, 361–62 (4th Cir. 1983). It was the district court that reached its dispositive findings by giving improper weight to a "selective interpretation" of an unclear video, Response Br. at 58, not Mr. Wall. Each decision about the Alpha Building claims and counterclaims turned

on the district court's findings that "[v]ideo evidence corroborate[d]" four officers and "contradicted" Mr. Wall. JA1326. No plausible view of the video supports those dispositive findings. And Defendants' silence on Mr. Wall's numerous reasons why speaks volumes. Take, for instance, the district court's finding that the video corroborated Sergeant Large. *See* JA1326. Sergeant Large testified that Mr. Wall was "swinging [his] fists and elbows" before being pepper-sprayed, JA937, and wrote in a report that Mr. Wall "was still resisting and striking staff with his fists" after, JA1204. What do Defendants say about the fact that the video shows no such behavior? *See* Opening Br. at 46–48. Not one word.

Nor do Defendants attempt to defend numerous other ways in which the critical findings are fatally flawed:

- The district court faulted Mr. Wall when the video did not show officers punching him, without acknowledging that officers blocked him from view or applying the same skepticism when video failed to corroborate the officers. *See* Opening Br. at 47–48.

- The district court failed to address the fact that, at "the exact time" Officer Hicks believed Mr. Wall had punched him, the video did not show a punch. *See* JA835; Opening Br. at 43–44.

- The district court never referenced—let alone resolved—inconsistencies in Defendants' testimony about how the altercation began, while noting minor inconsistencies in Mr. Wall's testimony. *See* Opening Br. at 48–52.

Defendants cannot justify the dispositive weight the district court placed on the video or the district court's silence about how the video corroborated Mr. Wall's testimony and undermined Defendants'.

Just like the district court though, Defendants assert the video can resolve factual disputes it most certainly cannot. Contrary to Defendants' assertions, the video does not show whether officers "hit and kicked [Mr. Wall] in the head," because their bodies often block him from view and the altercation began out of the view of any camera. *Compare* Response Br. at 56–57 *with* Opening Br. at 7, 48. But the video does show an officer's arm rearing back and punching toward Mr. Wall at one point. *See* Opening Br. at 41. Defendants question whether that is Mr. Wall's arm, *see* Response Br. at 9 n.2, but even the magistrate judge saw it was "the *officer's* arm," JA840 (emphasis added).[3]

[3] To the extent Defendants state that Mr. Wall "contend[ed] that" Officers Rasnick and Hicks "assaulted him for no reason," and then question the plausibility of that account, Response Br. at 1, 12, 59, they misstate the record. Mr. Wall testified that this incident was not the first time Officer Rasnick had a "verbal exchange" with him, JA327, and that Officer Rasnick said he needed "to do something about [Mr. Wall's] mouth," JA260; *see also* Opening Br. at 51.

This Court should reverse the district court's clearly erroneous findings and remand for a proper fact-finding process regarding the Alpha Building claims and counterclaims.

B. Defendants distort the standard of review and the record when addressing findings about events outside the Alpha Building.

Defendants misconstrue both the standard of review and the evidence for Mr. Wall's excessive force and deliberate indifference claims regarding his condition and treatment outside the Alpha Building.

The district court rejected these claims because video did not show Mr. Wall asking for help or struggling to breathe and three witnesses testified that he never lost consciousness or requested decontamination. JA1326–28. Contrary to Defendants' assertion, Mr. Wall need not "unambiguously refute" that testimony or show that the district court's credibility findings are "without support" in the record. *See* Response Br. at 60. Even if "there is evidence to support" the findings, this Court should reverse because the district court failed to account for video and medical records that contradicted the witnesses' testimony. *See Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 573–75 (1985) (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)); Opening Br. at 38, 52–60.

Defendants offer their own erroneous interpretation of the video without defending the district court's. They view the A123 Vestibule Video to be "equally—if not more—consistent with [Mr. Wall] charging head-first out of the housing unit, rather than being carried." Response Br. at 59–60. Yet they never explain how Mr. Wall plausibly could have done so when he undisputedly was handcuffed, in leg irons, and surrounded by officers. *See* JA1263; Opening Br. at 56. And Defendants never mention the video following that one: Officers are carrying Mr. Wall—at one point with his white shoe near an officer's shoulder. Opening Br. at 55–59. As for whether Mr. Wall was later "sitting upright . . . and appear[ed] to shake his head," Response Br. at 60, officers appear to be propping him up while removing his clothing. And the slight movement of his head at 10:39–10:40 is consistent with testimony that he was in and out of consciousness. *See* JA190.

Unable to defend the district court's fact-finding, Defendants are wrong that any errors regarding Mr. Wall's deliberate indifference claim are harmless because he failed to establish any objectively serious medical need. *See* Response Br. at 60–62. Defendants state that Mr. Wall only "testified that he was not provided water to decontaminate" after

being pepper sprayed. Response Br. at 61. They ignore evidence that Mr. Wall lost consciousness, experienced severe pain, and was inhaling "fumes" with "gas on [his] face" when officers put him in five-point restraints and a spit mask for roughly three hours. *See* JA182–83; JA190–96; JA323; Opening Br. at 59. Mr. Wall easily meets the objective prong for his excessive force claim—a point Defendants do not contest.[4] His condition also shows a serious medical need for his deliberate indifference claim. *See Iko v. Shreve*, 535 F.3d 225, 241 (4th Cir. 2008) (explaining one of two ways to show such a need: it "is so obvious that even a lay person would easily recognize the necessity for a doctor's attention" (citation omitted)). A lay person would obviously recognize the need for treatment here. *See id.* at 231–32, 241 (concluding that "even a lay person would infer from [a plaintiff's]" collapse "that he was in need of medical attention" after exposure to multiple bursts of pepper-spray mist). Mr. Wall's condition was far more serious than "the normal

[4] That claim's objective component required only a showing of "more than de minimis force." *See Dean v. Jones*, 984 F.3d 295, 303 (4th Cir. 2021). The district court never questioned that Mr. Wall made that showing. *See* JA1280–81; JA1326–28; *Williams v. Benjamin*, 77 F.3d 756, 764–65 (4th Cir. 1996).

discomfort of pepper spray" for "90 to 120 minutes," *Moskos v. Hardee*, 24 F.4th 289, 298 (4th Cir. 2022).

As this analysis shows, this Court cannot deem the district court's clearly erroneous findings regarding the subjective prong of Mr. Wall's deliberate indifference claim harmless and affirm based on the objective prong. The district court's clear error in crediting Defendants' testimony based on one video—without mentioning other video and medical reports contradicting that testimony—applies to both prongs and warrants reversal.

III. Officer Rasnick presents a theory for battery that cannot be reconciled with the district court's findings or his own testimony.

Officer Rasnick does not respond to the argument that he failed to prove assault, so this Court can deem that issue conceded. *See* Opening Br. at 63–64; *Alvarez v. Lynch*, 828 F.3d 288, 295 (4th Cir. 2016) (explaining that an "outright failure to join in the adversarial process would ordinarily result in waiver"). Nor does Officer Rasnick defend the district court's clear error in finding that Mr. Wall struck him or point to any other finding that Mr. Wall unlawfully touched him for purposes of

battery liability. *See* Opening Br. at 61–62. These points warrant reversal of the district court's clearly erroneous assault and battery rulings.

Focusing solely on battery, Officer Rasnick now argues that Mr. Wall is "liable for all natural consequences of his conduct" after "set[ting] in motion the events that resulted in Officer Rasnick's injury." Response Br. at 64 (citing *R.G. Lassiter & Co. v. Grimstead*, 132 S.E. 709, 712 (Va. 1926)). But Officer Rasnick ignores that he had to prove that Mr. Wall "deliberately made or caused contact with the person of" Officer Rasnick or "acted with knowledge to a substantial certainty that such contact would result." *See* 1 Personal Injury Law In Virginia § 14.2 (2021). Officer Rasnick failed to do so.

Officer Rasnick's *brief* says that Mr. Wall's hands "were deliberately making contact with [both officers]" after the three men fell to the ground. Response Br. at 63–64. But Officer Rasnick's testimony says otherwise: Asked directly, he did not recall having been "struck or hit or *anything else* during the struggle[.]" JA417 (emphasis added). Officer Rasnick did testify about him and Officer Hicks tackling Mr. Wall after Mr. Wall had swung at Officer Hicks, *see* JA395–97, but those acts do not constitute intentional, unlawful touching by Mr. Wall against

Officer Rasnick. Nor does testimony about Mr. Wall "trying to get loose" while on the ground, *see* JA415, identify deliberate physical contact with Officer Rasnick. On this record, this Court should order entry of judgment against Officer Rasnick.

Even if this Court were to find offensive touching under Officer Rasnick's new theory, it still would need to reverse and remand the district court's damages award. Officer Rasnick testified that he "twisted [his] right knee" "as a result of this incident." *See* JA396; JA416. That injury was the basis for his $20,000 damages award. *See* JA1284–85. Yet there is no evidence that injury resulted from any physical contact, let alone contact that Mr. Wall intentionally caused. *See* 1 Virginia Model Jury Instructions - Civil Instruction No. 36.090 (2021) (instructing that damages should "compensate [a] plaintiff for the damages sustained as a result of the [battery]"). If this Court does not order the entry of judgment against Officer Rasnick on his battery claim, it still should remand with an instruction to award no damages.

CONCLUSION

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

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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 6,443 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 March 7, 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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