UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

Lin Li Qu, et al. *Plaintiff*,	)	
v.	)	CA-09-CV-0053-S
Central Falls Detention Facility Corporation, et al.	)	
Defendants.	)	

PLAINTIFF'S OPPOSITION TO DEFENDANT LARRY SMITH'S MOTION FOR SUMMARY JUDGMENT

Before the Court is the latest attempt by Defendant Larry Smith (hereinafter "Smith") to avoid responsibility and liability for his role in the atrocities that faced Jason Ng (hereinafter "Ng") while Ng was in federal custody between July 2007 and his untimely death in August 2008. Smith asks this Court to find, as a matter of law and fact, that either: (1) Smith's actions did not violate any constitutionally protected right of Ng; or (2) Smith's liability is extinguished by the doctrine of qualified immunity if such constitutional violations have been established. Smith's plea for immunity must be denied at this juncture, however. First, there are material facts in dispute that preclude the entry of summary judgment. Second, the facts, when construed in the light most favorable to the Plaintiff , establish that Smith individually violated Ng's Sixth and Eighth Amendment rights under the United States Constitution. Finally, the facts of this case easily defeat any shield of qualified immunity as they establish that Smith knowingly violated Ng's Constitutional rights. For each of these reasons, Smith's Motion for Summary Judgment must be denied.

I. Plaintiff's Statement of Disputed Facts

1. On July 3, 2008 ICE Detention Operations Coordinator Larry Smith personally signed an order transferring Jason Ng from a detention facility in Vermont to the Donald W. Wyatt Detention Facility ("Wyatt") because of "medical issues." Despite personally signing this order, Mr. Smith denies that he had actual knowledge that Mr. Ng had medical issues. (*See* Deposition of Defendant Larry Smith at p. 36, attached hereto as Exhibit A).
2. Mr. Smith did not follow up to ensure that Mr. Ng had been properly transferred or that Mr. Ng's medical condition and issues had been addressed. (Ex. A, pp. 37-38, 43).
3. On July 29, 2008 Mr. Smith ordered that Mr. Ng be transported to the Hartford ICE office based solely on information provided to him by a Wyatt transportation officer. This information was that Mr. Ng was complaining about his treatment at Wyatt; that Mr. Ng had not gone on a scheduled appointment for a CT scan; and that Mr. Ng was not able to make telephone calls from Wyatt to his family members or his attorneys. (Ex. A, pp. 48-49).
4. Prior to ordering that Mr. Ng be sent to Hartford, Mr. Smith made no inquiries to Wyatt to determine why Mr. Ng required a CT scan, and made no inquiries with anyone at Wyatt as to why Mr. Ng was unable to make telephone calls at Wyatt. (Ex. A, pp. 50-51).
5. Mr. Smith also had no knowledge of whether ICE employees were following the ICE Detention Standard that required them to travel to Wyatt every week to meet with detainees being held at Wyatt and to address the concerns of the detainees. (Ex. A, pp. 55-56).

6. Further, prior to ordering that Mr. Ng be transported to Hartford Mr. Smith did nothing to determine whether any Hartford ICE detention officers would be visiting Wyatt.
7. When Mr. Smith first observed Mr. Ng at the Hartford ICE office, Mr. Ng complained to Mr. Smith that he had medical problems, including pain, and that he was unable to make telephone calls at Wyatt. (Ex. A, p. 108, 110-111).
8. Mr. Smith did nothing to investigate why Mr. Ng was unable to make calls at Wyatt. (Ex. A, p. 111).
9. Mr. Smith stated that he was not concerned "at all" that Mr. Ng would be unable to make phone calls when he returned to Wyatt and that Mr. Smith "wasn't there to solve the problem" but rather to "accommodate the individual that day." (Ex. A, p.116).
10. Rather than discuss Mr. Ng's issues directly with the staff at Wyatt Mr. Smith presumed that the Wyatt transportation office would address Mr. Ng's issues with the staff back at Wyatt. (Ex. A, pp. 113-114).
11. Mr. Smith was present while Mr. Ng spoke to his sister on a speaker phone in the Hartford office. (Ex. A, p. 117).
12. Mr. Ng's sister, Wendy Ng, initially received a call from Mr. Smith in Hartford that morning. Mr. Smith initially spoke to Wendy about Mr. Ng's immigration case. (Deposition of Pui Lui Ng ("Wendy Ng Dep.") at pp. 36-37, attached hereto at Exhibit B).
13. Wendy was then allowed to speak to her brother who was crying and told her that he couldn't walk. Mr. Ng next told Wendy that he had been tortured by the staff at Wyatt. She testified that she did not recall specifically whether Mr. Ng was speaking English or Chinese when he described the torture to her, although she does recall that Mr. Smith was

in the background screaming at Mr. Ng to speak English. Wendy's testimony regarding this portion of this telephone call with her brother and Mr. Smith is as follows:

Q. And did the officer identify himself when he called you?
A. I don't remember the name. I think the – maybe the last name is Smith, Smith.
Q. Was it Larry Smith or Lawrence Smith?
A. I don't know the name.
Q. But you heard the name Smith?
A. Yeah.
Q. So he identified himself to you, and then he – he said – can you tell me that again.
A. He had, um – he mentioned my brother's name. I say I know this person. And he say – he say should we release him on the street or should you guys talk to your lawyer to we drop the case. To we drop the immigration case. Yes.
Q. And what else did the officer say to you?
A. He say, I don't know why – how come Ng, he's in here. I don't know why Donald Wyatt, they pull him to the --- he say he didn't know why the Donald Wyatt, the people over there, they took him to the office. He says he didn't know why.
Q. Were you – anything else? Did he say anything else to you?
A. And then I think I could able to talk to my brother a little bit. He was crying, he was crying. And the officer say, speak English, speak English. You cannot speak Chinese. So he say, speak English. I hear from the background the officer was screaming at him, he say speak English.
Q. And was that the same officer that you had spoken to?
A. Yes.
Q. And what was it your brother told you at that time during that phone call? What did he say?
A. That phone call, he was – he was crying. He said my – my – at first he – one of them, they – one of the things, he couldn't walk. But end up that they, they pull him out -- the Donald Wyatt people, they pull him out from the gate and then they tortured him. He told me with detail. Then he say they torture him. Then, he told them he couldn't walk. He said I don't want to survive if my both legs cannot walk.
Q. And did he tell you this in what language? What language?
A. English. Because the officer, he was screaming in the background, English. English or Chinese, I – I don't remember details.
Q. So it's possible he may have said it in Chinese?
A. It's possible, too, yes.

(Ex. B, pp. 37-38).

16. Wendy further states that her brother was "begging" Mr. Smith in Hartford that day for medical care and to be taken to the hospital. She testified:

> Q. Do you know whether he asked anyone in the Hartford ICE –Immigration and Custom Enforcement office to get him medical care on the 30th?
> A. He was begging them.
> Q. He was begging the folks at ICE that day to get him medical care?
> A. Because I – I want to get him to the hospital where – I don't care, I could pay for that. They wouldn't let him do it. I mean, I don't understand. Yes, he was begging them when he was in Hartford, too. What kind of person is…
> Q. Did he say who he asked at Hartford to let him go to the hospital?
> A. No, I don't know. The officer. I don't know. He was begging them. He needs to go to the hospital.
> Q. Take your time. It's all right.
> A. It just make me so mad. I don't understand why.

(Ex. B, p. 55).

17. Mr. Smith testified that he did not seek emergency services for Mr. Ng while at Hartford because "he did not physically appear to be hurting." He based his judgment on conversations he had with Wyatt. He did not examine Mr. Ng to see if he could walk and explained that he decided to return Mr. Ng to Wyatt rather than bring him to a hospital because "[h]e was not in pain or agony. He wasn't screaming." (Ex. A, pp. 126-127). This testimony is contrary to several other accounts of Ng's physical appearance on July 30, 2008 and is highly suspect in light of the videotape of events at Wyatt on July 30, 2008.

18. ICE "Guidelines for the Use of Hold Rooms at Field Office Locations" states "staff shall immediately call the local emergency service when a detainee is determined to need urgent medical treatment. Staff shall immediately notify supervisory personnel of all emergencies." (Ex. C).

19. Mr. Smith's decision that Mr. Ng did not need emergency medical care was allegedly based not on his own observation but in reliance on the medical staff at Wyatt. (Ex. A, pp. 136-137).

20. Mr. Ng told Mr. Smith that he was not satisfied with the medical treatment he was getting at Wyatt and asked if he could see his own physician. He also asked for a wheelchair and "other things." (Ex. A, pp. 133-134).

21. Mr. Smith did not know at the time whether ICE had the ability to intervene on Mr. Ng's behalf or to order that Mr. Ng see another doctor. (Ex. A, p. 134).

22. In the spring of 2008 Mr. Ng's attorney began communicating concerns to ICE that Mr. Ng's medical condition warranted ICE's attention. (Deposition of Andy Wong at pp. 52-53, Attached hereto at Exhibit D).

23. Prior to Mr. Smith ordering that Mr. Ng be brought to Hartford, Mr. Ng's attorney, Andy Wong, contacted ICE on many occasions to request that Mr. Ng receive better treatment, including medical treatment and access to an attorney, from Wyatt. (Ex. D, pp. 50-51).

24. Mr. Smith contacted Attorney Wong by speaker phone from Hartford on July 30, 2008 with Mr. Ng present. During this call Mr. Ng stated that he could not walk and needed a wheelchair while at Wyatt and as a result of not being able to walk he could not get his medication at Wyatt. (Ex. D, p. 78). He also stated that he was concerned that the condition would deteriorate until he would become completely disabled. (Ex. D, p. 86).

25. While at Wyatt in July, 2008, Mr. Ng's physical condition became so painful and deteriorated so much that:

a. he was unable to walk to pick up his medication at the medication counter at Wyatt;

b. he had difficulty getting off his bed to use the toilet that was located in his cell;

c. he needed the assistance of other inmates to bring him food and help him to the bathroom;

d. he was unable to take a shower or leave his cell for five days in a row;

e. he was unable to meet with Attorney Wong when Attorney Wong drove from New York to visit Mr. Ng on July 26, 2008;

f. he was unable to go to a scheduled CT scan on July 29, 2008.

Mr. Ng repeatedly requested a wheelchair while at Wyatt that would have permitted him access to each of these activities. He was repeatedly denied use of one. (Affidavit of Andy Wong at ¶ 46-59, attached hereto at Exhibit E).

26. During his telephone conversation with Mr. Smith Attorney Wong requested that Mr. Smith grant a wheelchair at Wyatt. Officer Smith told Mr. Wong that the determination was made by a doctor at Wyatt and that Mr. Ng was not and would not be given a wheelchair. (Ex. E, ¶11).

27. Mr. Ng described his back and leg pain, told Mr. Smith and Attorney Wong that he could not walk, and asked Attorney Wong to help him obtain a wheelchair because he could not otherwise move. (Ex. E, ¶13).

28. Officer Smith replied that Mr. Ng needed to do exercises, not stay in bed and needed to cooperate with Wyatt to get medical treatment. Mr. Smith further stated that Mr. Ng had refused to get in a wheelchair for his CT scan the day before and that Mr. Ng would not be permitted to be examined by an outside doctor. (Ex, E, ¶16-18).

29. Mr. Ng then told Attorney Wong that he had to be released from Wyatt within two weeks because "he could no longer withstand the suffering inside the facility." Mr. Smith stated that Mr. Ng would need to withdraw all of his appeals before the Board of Immigration before ICE would begin the approval process. (Ex. E, ¶19-21).

30. Mr. Smith testified that if Mr. Ng in the future needed to use the telephone that he possibly would bring him back to Hartford if requested to do so by the Wyatt transportation officer. (Ex. A, p. 151).

31. Mr. Smith testified that he did not believe that a man in his thirties who could not walk constituted a medical emergency. (Ex. A, p. 153).

32. When sending Mr. Ng back to Wyatt Mr. Smith, with the assistance of three other men, helped assist Mr. Ng back into the van. At that time he knew that Mr. Ng could not get out of his wheelchair on his own, that Mr. Ng could not get into the van on his own, and that Mr. Ng needed a number of people to pick him up and place him in the van. (Ex. A, p. 169).

II. Legal Standard for Summary Judgment

Federal Rule of Civil Procedure 56 says that summary judgment is "appropriate only if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c)(2).[1] Issues are "genuine" if "a rational fact finder could resolve the issue in favor of either party, and a fact is 'material' if it has the capacity to sway the outcome of the litigation under the applicable law." *Chopmist Hill Fire Dep't. v. Town of Scituate*, 780 F. Supp. 2d 179, 184 (D.R.I. 2011) (Internal quotation omitted). In other words, "on a summary judgment motion, [a] genuine issue exists where a reasonable jury could resolve the point in favor of the non-moving party." *Estrada v. Rhode Island*, 594 F.3d 56, 62 (1st Cir. 2010) (internal quotations omitted.) In the first instance, the moving party bears the burden under Rule 56 to show that no genuine issue of material fact exists. (*Id.*) Once the moving party so shows, the non-moving party must set out specific facts sufficient to show genuine issues for trial. *See* Rule 56(e)(2). *See also Chopmist* at 184. The non-moving party "may not rely merely on allegations or denials in its own pleading; rather, its response must – by affidavits or as otherwise provided in [the] rule – set out specific facts showing a genuine issue for trial." (*Id.*) Finally, the

[1] Further references to the Federal Rules of Civil Procedure will be in the form "Rule ___."

court must view *the entire record* "in the light most hospitable to the party opposing summary judgment, indulging all reasonable inferences in that party's favor." *Fiacco v. Sigma Alpha Epsilon Fraternity*, 528 F.3d 94, 98 (1st Cir. 2008).

Plaintiff presents sufficient evidence herein for the Court to determine that Defendant's Motion for Summary Judgment ("Defendant's Motion") should be denied as a matter of law. Plaintiff's Fourth Amended Complaint and supporting admissible depositions, affidavits and other documents offer more than enough admissible evidence for this Court to determine that several issues of material fact remain to be determined in this litigation and that Defendant is not entitled to judgment as a matter of law. As such, Defendant's Motion should be denied on all grounds.

III. Legal Argument

A. Smith, Himself, Violated Ng's Sixth and Eighth Amendment Rights and Cannot Shield Himself From Suit By Qualified Immunity

It is unfortunately true that there is often enough blame to go around. And so it is with the appalling abuse, indifference, and sheer lack of human decency suffered by Jason Ng ("Ng") while he was detained by Immigration Custom & Enforcement ("ICE") between July 19, 2007 and his death from metastatic liver cancer on August 6, 2008. (Fourth Amended Complaint ¶¶ 66, 121.)[2] Defendant Smith would have this Court believe that he was blissfully ignorant of the abuse Ng suffered while detained at Wyatt, the facility with which ICE contracted to hold detainees facing various immigration violations, that he lacked the authority to do anything about Ng's mistreatment at Wyatt, and most egregiously, that Smith behaved entirely appropriately when Ng appeared before him at the ICE office in Hartford, Connecticut, on July 30, 2008. While Plaintiff does not deny that Smith is correct in asserting Wyatt treated Ng very poorly and

[2] References to the Fourth Amended Complaint will be in the form ¶ ___.

does not excuse Wyatt's despicable behavior, (Defendant's Motion 24), Plaintiff will present facts sufficient to show that Smith, himself, also violated Ng's Sixth and Eighth Amendment rights under the United States Constitution and that Smith is not eligible to assert qualified immunity under these circumstances.

1. Smith Violated Ng's Eighth Amendment Right By Denying Him Access to Medical Care and By Displaying Deliberate Indifference to His Medical Needs

The United States Supreme Court's decision in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 91 S. Ct. 1999 (1971), permits direct claims against federal officials who violate an individual's constitutional rights. More specifically, the First Circuit has held that "'the purpose of *Bivens* claims is to deter individual federal officers from committing constitutional violations.'" *Chiang v. Skeirik*, 582 F.3d 238, 242 (1st Cir. 2009) (quoting *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 70 (2001)).[3] Claimants seeking relief under *Bivens* "must prove the violation of a constitutional right by a federal agent acting under cover of federal law." *De Mayo v. Nugent*, 517 F.3d 11, 14 (1st Cir. 2008). In this action, there is no doubt that Smith, while acting in his capacity as an ICE officer assigned to the ICE office in Hartford on July 30, 2008, was acting under cover of federal law. There is also no doubt that Smith violated Ng's constitutional rights by denying his access to medical care and by displaying deliberate indifference to his medical needs, thereby violating the Eighth Amendment. *See Carlson*, 446 U.S. 14 (1980) (extending *Bivens* actions to federal agents' violations of the Eighth Amendment).

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[3] The Court extended *Bivens* to violations of the Eighth Amendment in *Carlson v. Green*, 446 U.S. 14 (1980). While the Supreme Court has not extended *Bivens* to violations of the Sixth Amendment, lower courts have recognized the applicability of *Bivens* to such violations. *See, Wounded Knee Legal Defense/Offense Comm. v. Federal Bureau of Investigation*, 507 F.2d 128 (8th Cir. 1974); *see also, Coy Phelps v. Local 0222*, No. 09-11218-JLT, 2010 WL 3342031 (D. Mass. 2010).

It is well-established that the failure to provide medical care to an injured detainee or prisoner[4] violates the Constitution's Eighth Amendment prohibiting cruel and unusual punishment. *See e.g., Layne v. Vinzant*, 657 F.2d 468 (1st Cir. 1981); *Bertram v. Wall*, No. Civ. A. 01-422 ML, 2003 WL 21313374 at *5 (D.R.I. May 29, 2003); *Rosen v. Chang*, 758 F. Supp. 799 (D.R.I. 1991). To state a cognizable claim for such an Eighth Amendment violation, "a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs." *Estelle v. Gamble*, 429 U.S. 97, 106 (1976); *see Sires v. Berman*, 834 F.2d 9, 12 (1st Cir. 1987); *see also Bianchi v. Bartlett, R.N.*, No. 07-cv-11960-PBS, 2011 WL 1326639 at *4 (D. Ma. March 31, 2011) ("To prevail on a claim under §1983 alleging improper medical care in prison in violation of the Eighth Amendment, the plaintiff must show both that he had a serious medical need and that the defendant was deliberately indifferent to that medical need.").[5] To determine deliberate indifference a court must find: (1) that an inmate's medical needs are objectively serious; and (2) that the defendant had the necessary intent akin to criminal recklessness. *Bertram*, 2003 WL 21313374 at *5. As one court recently noted, the necessary intent requires culpability somewhat greater than negligence but less than a purpose to do harm. *See Coscia v. Town of Pembroke*, No. 10-1714, 2011 WL 4068533 at *3 (1st Cir. September 14,

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[4] While courts do recognize the difference between the postures of pre-trial detainees and convicted inmates and cases for constitutional violations against pre-trial detainees are brought pursuant to the due process clause of the Fifth or Fourteenth Amendments as opposed to the Eighth Amendment, many circuits apply the same Eighth Amendment deliberate indifference standard to denial of medical care claims under the due process amendments. *Calderón-Ortiz v. Laboy-Alvarado, 300 F.3d 60, 64 (1st Cir. 2002); Cuoco v. Moritsugu*, 222 F.3d 99, 106 (2d. Cir. 2000); *Phillips v. Roane County, Tenn.*, 534 F.3d 531, 539-40 (6th Cir. 2008); *Butler v. Fletcher*, 465 F.3d 340, 344 (8th Cir. 2006), *cert. denied*, 550 U.S. 917 (2007); *Whiting v. Marathon County Sheriff's Dep't*, 382 F.3d 700, 703 (7th Cir. 2004) (quoting *Washington v. LaPorte County Sheriff's Dep't*, 306 F.3d 515, 517 (7th Cir. 2002)); *Olsen v. Layton Hills Mall*, 312 F.3d 1304, 1315 (10th Cir. 2002) (quoting *Lopez v. LeMaster*, 172 F.3d 756, 759 n.2 (10th Cir. 1999)); *Brown v. Harris*, 240 F.3d 383, 388 (4th Cir. 2001); *Lancaster v. Monroe County, Ala.*, 116 F.3d 1419, 1425 & n.6 (11th Cir. 1997), *overruled on other grounds by LeFrere v. Quezada*, 588 F.3d 1317 (11th Cir. Ala. 2009).

[5] Deliberate indifference is often not suited to a summary judgment resolution because it requires a fact intensive inquiry focusing in large part on defendant's state of mind. *See Id.* ("Because of the fact intensive nature of this inquiry, and in particular its focus on the defendant's state of mind, it is often 'unsuited to resolution on summary judgment.'") (quoting *Sires*, 834 F.2d at 13).

2011). The first prong of deliberate indifference is met where the medical condition is diagnosed by a doctor or "[where it] is so obvious that ***even a lay person*** would easily recognize the necessity for a doctor's attention." *Id*, quoting *Estelle* at 104-05 (emphasis added). The second prong of deliberate indifference is met where "the official knew of and consciously disregarded a substantial risk of serious harm." *Bertram*, at *6.

Plaintiff agrees with Defendant Smith that the Eighth Amendment is not static (Summary Judgment Motion, 17) and "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society." (*Id*, quoting *Gregg v. Georgia*, 428 U.S. 153, 172-173 (1976). However, Plaintiff disagrees entirely with Defendant's position that he is entitled to summary judgment on Counts Four and Eight of the Fourth Amended Complaint because, by his reckoning, no facts support Plaintiff's claims against him for cruel and unusual punishment and/or for deliberate indifference to Ng's medical needs. In fact, Smith behaved on July 30, 2008 in complete contradiction of the decency "mark[ing] the progress of a maturing society." *Gregg*, 428 U.S. at 172-173.

As a preliminary matter, this Court must accept all facts as true offered by the Plaintiff, the non-moving party, on summary judgment. *See Fiacco*, 528 F.3d at 98. Therefore, the Court need not countenance Defendant's clear misstatement of the facts in this case. For example, Smith misconstrues the true gist of Plaintiff's Eighth Amendment claims against him, choosing to argue in Defendant's Motion that he was not in error by ordering Ng to travel the hour and a half from Wyatt to Hartford (Defendant's Motion, 19), that he never caused physical harm to Ng, himself (*Id*), that he was unaware that Wyatt abused Ng either on the morning of July 30, 2008, or at any other time and, therefore, was not in error in returning Ng to Wyatt (Defendant's Motion, 18), and, finally, in trusting Wyatt medical staff when it advised him that Ng's medical

needs were being met and that Ng was not following a prescribed treatment plan by failing to exercise and by "missing" appointments.[6] (Summary Judgment Motion, 23). Plaintiff in no way concedes that Smith is correct in any of the above averments. However, contrary to Defendant's Motion, none of these factors negate that Smith clearly violated Ng's Eighth Amendment rights. Plaintiff's Fourth Amended Complaint and admissible supporting affidavits, depositions and other relevant documents evidence facts that Smith violated Ng's Eighth Amendment rights by not seeking immediate medical care for Ng when he was in Hartford on July 30, 2008 (or at least taking steps to ensure that Ng received appropriate medical care upon his return to Wyatt), and by not tending to Ng's personal needs by providing access to a bathroom while Ng was in Hartford.

The First Circuit recently noted that "the government's obligation to prevent avoidable harm by providing medical care during custody is ... a substitute for the responsibility that a reasonable person would bear for himself if he were not detained." *Coscia*, 2011 WL 4068533 at *3. There is no doubt that ICE was responsible for providing adequate medical care to its detainees either on its own or through the detention facilities like Wyatt with which it contracted. Smith admitted this responsibility, saying that if he believed Ng needed to be seen by a doctor or a hospital on July 30, 2008, that he had the authority to seek such care.[7] (Smith Dep. 136: 14-

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[6] Ample evidence shows that Ng, in fact, did not "miss" medical appointments such as that scheduled on July 26, 2008, for an MRI but was unable to go to the appointment due to Wyatt's cruel refusal to give him a wheelchair. (¶10). Evidence also shows that Smith knew that Wyatt refused Ng a wheelchair during his detention. (Smith Dep. 134:2-9; 144:10-13; 144:17-20; 146:18-23; 148:12-15.) Smith's statement that he believed Ng's severe pain and total inability to walk could be attributed to Ng's failure to follow Wyatt's exercise plan (Defendant's Motion, 9) is quite simply so unreasonable and patently ridiculous as to defy any response. If anything, that Wyatt was "treating" functional paralysis with leg and back exercises should have put Smith on actual notice that Ng's needs were woefully unmet at Wyatt and required immediate intervention by a doctor. In short, Smith could not have believed that the care provided to Ng at Wyatt was anything close to reasonable, his statements to the contrary notwithstanding. (Defendant's Motion, 9.)

[7] Smith clearly acted with authority when he made the decision Ng's condition was not an emergency (Smith Dep. 136: 14-23); his subsequent statements that he lacked authority to seek medical care for Ng, notwithstanding (Smith Dep. 154: 1-6). In any event, Smith states on the record that even if he had proper authority, he would not

23)[8] (wherein Smith states on the record that he was aware that ICE could seek outside care for Ng in an emergency, Wyatt's contrary recommendations notwithstanding; Smith testified that he did not seek such care for Ng while he was in Hartford on July 30, 2008, because he did not view Ng's condition as an emergency.).

Similarly, there is no doubt, whatsoever, that Ng viewed his injuries as the type for which he would have sought medical care if he had not been prevented from doing so by his detention. In fact, as Plaintiff's Fourth Amended Complaint plainly alleges and as both the Deposition of Wendy Ng[9] and Andy Wong[10] clearly support, during the year of his detainment, Ng went from a healthy somewhat overweight individual (Wendy Ng Dep. 24:6-21; 96:20-97:19) (Wong Dep.70:7), able to engage in the normal activities of life to a thin, pale man (Wong Dep. 70:10-11) so destroyed by pain in his back and legs that he could not walk far enough to telephone family (Wendy Ng. Dep. 34:10-12; 50:23-51:3; 84:1-3) obtain badly-needed medicine (Wendy Ng Dep. 49:14-15) (Wong Dep. 77:2-8), meet with his attorney (Wong Dep. 44:16-47:6; 111:14-111:23), attend desperately necessary medical appointments for tests (Wong Dep. 110:12-111:13), or even attend to his own bathroom needs. (Wendy Ng Dep. 41:1-6.) In fact, Ng's condition was so dire by July 30, 2008, that he told his attorney that he was considering accepting deportation just so that his confinement would end and he could seek care. (Wong Dep. 57:5-13.) Any reasonable individual this desperate and ill would definitely seek a doctor's

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have used it on Ng's behalf to seek the medical care Ng so urgently required. (Smith Dep. 154: 6-8). Additionally, Plaintiff argues that, at a minimum, Smith had the authority and the duty to inform a supervisor of Ng's poor condition. He admittedly failed to do that too (Smith Dep. 126:5-8; 134:23-137:8), thereby acting with deliberate indifference and failing to provide the adequate medical care to Ng required by law. *See also Sires*, 834 F.2d at 12. In so doing, he also violated ICE regulations requiring staff to notify supervisors of emergencies. (*See infra* Disputed Fact #18.)

8 Relevant excerpts of the Larry Smith Dep. are attached hereto as Exhibit A.

9 Relevant excerpts of the Wendy Ng Dep. are attached hereto as Exhibit B.

10 Relevant excerpts of the Andy Wong Dep. are attached hereto as Exhibit D.

care if able. Obviously, Ng's detainment prevented him from seeking the immediate medical attention he required so he pursued the only option available to him: he and his family begged Wyatt, ICE, and Smith to help him. (¶¶ 79, 84-85, 87-94; 98-99; 101, 103, 111) (Smith Dep. 136:14-23; 154:6-8.) Their pleas met either with silence, utter indifference, or with "care" utterly inadequate to Ng's condition by each of the parties they approached. (*Id.*)

Evidence shows that by the time Smith met with Ng on July 30, 2008, his own eyes clearly showed him that Ng was gravely ill. First, Smith himself authorized and processed Ng's transfer from Vermont to Wyatt on July 3, 2008 for medical reasons. (Smith Dep. 34:3-35:3). Thus, he had actual knowledge that Ng was suffering from a medical condition serious enough to require a transfer of facilities. By the time that Ng arrived in Hartford 27 days later, it would have been apparent to any reasonable person that Ng's health had deteriorated significantly. Indeed, Smith, himself, says that while he originally sent a wheelchair to meet Ng because he thought he was being "noncompliant" (Smith Dep. 80:7-81:15; 82:17-22; 94:15-23; 96:16-19; 100:4-5; 208:4-209:24), within half an hour of meeting him, he believed Ng was not being "noncompliant" but rather was not well (Smith Dep. 115:17-116:4; 165:14-23) and ordered Ng's restraints removed. While seeing Ng was more than enough to put the reasonable person on notice that Ng needed medical attention, Wendy Ng states that she received a call from her brother on a speaker phone with Smith present during which Ng cried and begged to be taken to a hospital (Wendy Ng Dep. 54:6-55:22; 60:5; 62:19).[11] Sadly, even though Smith saw the terrible shape Ng was in and heard Ng describe his piteous plight to his sister, begging for a doctor's care, Smith utterly ignored the responsibility he had to seek medical assistance for Ng, a

[11] Wendy Ng's testimony directly contradicts Defendant's Motion which states, "Ng did not ask to be brought to the hospital that day." (Defendant's Motion, 11.) This dispute of facts should be resolved in the favor of Ms. Ng, the non-moving party. *See Fiacco v. Sigma Alpha Epsilon Fraternity*, 528 F.3d 94, 98 (1st Cir. 2008) ("we are obliged to 'view the entire record in the light most hospitable to the party opposing summary judgment, indulging all reasonable inferences in that party's favor'") (citation omitted).

detainee in his custody. *See Bianchi*, 2011 WL 1326639 at *6 (The court found that the record was "replete" with facts sufficient to show a violation of plaintiff's Eighth Amendment rights where defendant had actual knowledge of plaintiff's pain when she saw him bent over in pain, heard his dry heaving, and heard the plaintiff ask for medication). The law did not require that a doctor tell Smith what common sense so obviously revealed: Ng was a very sick man who needed the immediate care of a doctor. *See Bertram*, 2003 WL 21313374 at *5 (the first prong of deliberate indifference met "[where it] is so obvious that even a lay person would easily recognize the necessity for a doctor's attention."). That Smith ignored Ng's obvious plight with the necessary intent to deprive Ng of the treatment he needed meets the legal standard for deliberate indifference sufficient to show that Smith violated Ng's Eighth Amendment rights. *See Estelle*, 429 U.S. at 106; *see also Bianchi*, 2011 WL 1326639 at *7 ("Though proving deliberate indifference requires a showing of actual awareness of impending harm, a jury could find that a defendant's willful blindness to a prisoner's condition in the face of compelling indications of severe pain and discomfort rises to this level.") (citing *Manarite v. City of Springfield*, 957 F.2d 953, 956 (1st Cir. 1992).)

Smith also insisted on listening in to at least one phone call Ng had with Attorney Wong. In Wong's deposition, he testified that with Smith listening in, Ng told him in English that he (Ng) could not walk and needed Wong's assistance to procure a wheelchair for him and "complained he had been experiencing much pain and nobody was there to help him, especially after he was moved to the health service unit because he was housed alone." (Wong Dep. 63:25-64:16.) In Smith's hearing, Ng also told Wong that he was worried that his condition would deteriorate to the point that it became permanent. (Wong Dep. 86:8-23.) Again, this is evidence

that Smith knew of Ng's serious medical condition yet was deliberately indifferent to his medical needs.

Further evidence that Smith almost certainly knew of Ng's condition is provided by the photograph attached as Exhibit 1 to Plaintiff's Fourth Amended Complaint. The photo, taken almost immediately following Ng's return to Wyatt on the evening of July 30, 2008, shows such severe bruising on Ng's arms that it is strains credulity to believe that Ng was not manifesting signs of pain because of them and/or that Smith did not see them. The Complaint adequately alleges sufficient facts to show that Ng was tortured when he left Wyatt on the morning of July 30, 2008, and the videotape of Ng's transfer from Wyatt to Hartford on July 30, 2008 substantiates those allegations. (¶¶ 104-109). The horrendous mistreatment suffered when Ng was literally dragged from his cell to the bus for the trip to Hartford (*Id.*) more than sufficed to cause the injuries shown by the photo. In addition, the Complaint also adequately alleges that video images exist showing Wyatt personnel dragging Ng to the bus. (¶¶ 114, 231, 233-235, 242).

Smith similarly violated Ng's Eighth Amendment rights, along with all reasonable bounds of human decency, by failing to take the wheelchair-bound Ng to the bathroom during the more than 10 hours he was in the Hartford ICE office. *See Ferola v. Moran*, 622 F. Supp. 814, 822 (D.R.I. 1985). (In deciding defendant violated plaintiff's Eighth Amendment rights, the court found that where plaintiff was shackled to a bed and denied access to a bathroom for fourteen hours, "plain[ly] [there worked] great and gratuitous suffering on an individual to deny him, for so many hours, the opportunity to respond to a call of nature). (Internal quotation omitted.) (Smith Dep. 161:10-24). Smith knew that Ng was paralyzed and confined to a wheelchair, yet took absolutely no steps to ensure that Ng had reasonable access to bathroom

facilities during the trip to Hartford. (*Id.*) While the record does not show precisely that Ng lost control of his bowels and/or bladder, if it occurred while he was in the ICE office, it almost certainly served to put Smith on notice that Ng was in need of medical attention. It is also reasonable to assume that the average person would require the use of a bathroom at some point during the more than twelve hours that Ng was traveling to or from Hartford or was in the ICE office. It is difficult to conceive of a situation in which a reasonable person would not consider it a medical emergency for a young man to inexplicably lose control over his bowels or bladder or, in the alternative, to not have sufficient mobility to respect the signals of his body by voiding properly and in a timely fashion. However, even if Smith was not somehow put on notice of Ng's serious, life threatening medical needs as a result of the probable soiling of himself during the day at Hartford, the failure of Smith to take Ng to the bathroom was sufficient, by itself, to violate Ng's constitutional rights. *See Ferola*, 622 F. Supp. at 822.

2. Smith Violated Ng's Sixth Amendment Right to Adequate Representation by Counsel

As with Plaintiff's Eighth Amendment claim against Smith, her Sixth Amendment claims also arise under *Bivens*, 91 S. Ct. 1999. (*See infra* note 3). Pre-trial detainees have a substantial due process interest in the ability to communicate effectively with their attorneys. *See Johnson-El v. Schoomehl*, 878 F.2d 1043, 1051 (8th Cir. 1989). *See also Simpson v. Gallant*, 231 F. Supp. 2d 341, 348 (D. Me. 2002) (defendant presented a cognizable Sixth Amendment claim where he was denied telephone access to his attorney while a detainee). Further, a detainee's right to counsel is infringed by a lack of private communication with a lawyer. *Johnson-El* at 1052. As one court succinctly notes: "It is clear that an accused does not enjoy the effective aid of counsel if he is denied the right of private consultation with him." *Id.* (Internal citations and quotations omitted). Further, reasonable officials should recognize that a detainee's right to

private communication with an attorney is a clear constitutional right. *See Id.* ("reasonable officials would recognize in light of existing law that ... phone restrictions ... and the lack of privacy for communications with attorneys ... are unconstitutional.").

Smith does not dispute that he allowed Ng to call his attorneys, Cox and Wong, on July 30, 2008. (See Deposition of Lawrence Smith ["Smith Dep."], 32:16-33:6; 47:14-23; 105:10; 107:20; 118:6-7; 138:5-8; 142:21-147:11.) However, in doing so, he violated Ng's Sixth Amendment right to meaningful access to his counsel by forcing Ng to speak to Wong over a speaker phone in his presence and by forcing the conversation to take place in English instead of in Ng's native Cantonese. (See Smith Dep. 143:4-11; 143:22-144:6; 146:10-17; 194:6-10; 194:14-18; 219:18-220:6) and Wong Dep. 62:23-25; 82:3-6; 83:16-22.) Furthermore, Smith ordered that Ng be returned to Wyatt on July 30, 2008 but took absolutely no steps to ensure that Ng had continuing access to his counsel. In fact, Smith went so far in his deposition to testify that if Mr. Ng in the future needed to use the telephone that he possibly would bring him back to Hartford if requested to do so by the Wyatt transportation officer. (Smith Dep. 150:12-151:5.) That Smith had reason to believe that Ng might have continued problems with telephone access at Wyatt, his refusal to address those problems, and his grossly inadequate potential "solution" to the issues which involved forcing Ng to return to Hartford in order to make future phone calls further combined to deprive Ng of his constitutional right to reasonable access to an attorney while detained. *See Simpson*, 231 F. Supp. 2d at 348.

All in all, Smith failed to act reasonably, *see Johnson-El*, at 1052, and Plaintiff has averred material facts sufficient to show that a jury could conclude Smith deprived Ng of his Sixth Amendment rights. Therefore, Defendant's Motion must be denied on this ground.

B. Smith Is Not Entitled To Qualified Immunity

1. Smith Cannot Shield Himself With Qualified Immunity Pursuant to Standards Articulated by the Supreme Court and of The First Circuit

Smith argues that even if this Court finds there is sufficient evidence to find that he violated Ng's constitutional rights, he is shielded by qualified immunity because "no reasonable law enforcement officer in Smith's position would have known that his conduct violated a clearly established constitutional right." (Defendant's Motion 14). However, Smith is not entitled to the shield afforded by qualified immunity.

Following the Supreme Court's lead in *Pearson v. Callahan*, 129 S. Ct. 808 (2009), the First Circuit has developed a two-part test for qualified immunity.[12] The first prong requires a determination that "the facts alleged by the plaintiff make out a violation of a constitutional right." *Maldonado*, 568 F.3d 269. The second prong requires the determination that if a constitutional right was violated "[that] the right was clearly established at the time of the defendant's alleged violation." (*Id.*) (Internal citations omitted). The "clearly established" prong similarly consists of two distinct parts: First, the law in question must be clear at the time of the violation and second, "[that] a reasonable defendant would have understood that his conduct violated the plaintiff's constitutional rights." (*Id.*) In short, "the salient question is whether the state of the law at the time of the alleged violation gave the defendant fair warning that his particular conduct was unconstitutional." (*Id.*) In making its qualified immunity determination, a court can and should use its knowledge of legal precedent both within and outside of its circuit. *See Barton v. Clancy*, 632 F.3d 9, 22 (1st Cir. 2011).

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[12] The First Circuit notes that in application, the two-part test is generally seen as a three-part test because the two prongs of the "clearly established" element are traditionally considered separately. *See Maldonado v. Fontanes*, 568 F.3d 263, 269 (1st Cir. 2009). However, the First Circuit now abandons its previous formal usage of the three-part test in favor of the two-part one articulated by the Supreme Court. (*Id.*)

Finally, when, as here, a case is in the summary judgment context, "'a court must proceed by first identifying the version of events that best comports with the summary judgment standard and then asking whether, given that set of facts, a reasonable officer should have known that his actions were unlawful." *Petro v. Town of West Warwich ex. rel. Moore*, 770 F. Supp. 2d 475, 478 (D.R.I. 2011). In addition, "the Court must view the facts in the light most favorable to the non-moving party, drawing all reasonable inferences in that party's favor." *Bianchi*, 2011 WL 1326639 at *4 and *9 (internal quotation omitted) (defendant could not obtain summary judgment on the basis of qualified immunity where a "hotly disputed fact" remained regarding whether defendant was aware of plaintiff's pain).

2. Smith is Not Entitled to Qualified Immunity for Violating Ng's Eighth Amendment Right to Adequate Medical Care While Detained

Smith violated Ng's constitutional right to be provided medical care while detained by failing to seek for his detainee the desperately needed care of a doctor warranted by Ng's condition. *See infra* III,A,1. Smith further violated Ng's Eighth Amendment right prohibiting cruel and unusual punishment when he failed to provide any meaningful way for Ng to utilize bathroom facilities during the hours he spent in the Hartford ICE offices, despite knowing that Ng could not access those facilities himself. *Id.* Therefore, the first prong of the qualified immunity test is met, namely that Plaintiff's Fourth Amended Complaint and supporting evidence make out a violation of Ng's Eighth Amendment rights. *See Maldonado*, 568 F.3d at 269.

The second prong of the qualified immunity test is also met: a detainee's Eighth Amendment rights to receive medical care and to not endure cruel and unusual punishment are clearly articulated and a reasonable person in Smith's shoes should have known he violated the

law by his actions. *Id.* A prisoner/detainee's right to be provided with adequate medical care pursuant to the Eighth Amendment has been the law of the land at least as long as the Supreme Court's opinion in *Estelle v. Gamble*, 429 U.S. 97, issued in 1976. *Estelle* and its considerable progeny, in turn, have amply fleshed out the requirement that in order to posit a cognizable violation of Eighth Amendment rights for lack of medical care, a detainee must "allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs." *Estelle*, 429 U.S. at 106; *See also Bertram*, 2003 WL 21313374 at *5 and *6 (noting that the first prong of deliberate indifference can be shown where a "medical condition is so obvious that even a lay person would easily recognize the necessity for a doctor's attention" and where the second prong is met where an official "knew of and consciously disregarded a substantial risk of serious harm."). *See also infra* III,A,1. In like manner, the Eighth Amendment right to use a bathroom has been articulated by this Court in its 1985 opinion, *Ferola v. Moran*, 622 F. Supp. at 822. Therefore, there is little reason to believe that the laws Smith violated through his actions on July 30, 2008, were not clearly articulated at the time.

The final determination that this Court must make in denying qualified immunity to Smith is that a reasonable person in Smith's position would have known that his acts violated the constitutional rights of another. *See Maldonado*, 568 F.3d at 269. The facts of this case are replete with evidence that Smith had the authority to seek help for Ng if he believed it was warranted (Smith Dep. 136:14-23), that he deliberately failed to do so because he did not believe that Ng's case was an emergency (Smith Dep. 154:6-8), that he failed to even consult a supervisor (Smith Dep. 126:5-8; 134:23-137:8), and that he was clearly wrong, not through mistake but through deliberate indifference in his belief, since Ng was crying and begging to go to a hospital (Wendy Ng Dep.54:6-55:22; 60:5; 62:19), unable to walk (Smith Dep. 99:14-24;

109:22-110:8; 122:3-11; 126:14-17; 153:15-22; 217:14-19), (Wendy Ng Dep. 34:10-12; 50:23-51:3; 84:1-3; 49:14-15) (Wong Dep. e.g., 32:20-25; 40:3; 63:23-64:5; 78:47), in severe pain (Wendy Ng Dep. 55:4-5; 61:24-62:3), and incapable of the most basic of human functions such as toileting on his own (¶¶ 89, 98) (Wendy Ng Dep. 41:1-6) . In addition, Smith had every reason to know that Ng was receiving ridiculously inadequate medical treatment at Wyatt (Wendy Ng Dep. 34:10-35:3; 49:8-15). Smith did not have a choice. He was constitutionally obligated to seek medical care for a detainee under his authority and his failure to do so was a deliberate violation of Ng's constitutional rights. Therefore, Smith cannot be shielded by qualified immunity.[13] *See Bianchi*, 2011 WL 1326639 at *9 (Defendant nurse not entitled to qualified immunity where whether she was aware of Plaintiff's pain and failed to notify a doctor remained a "hotly disputed fact." If she was aware of Plaintiff's pain and did not seek a doctor's care for him, "a reasonable nurse in her situation should have been aware that her actions rose to a constitutional violation.").

3. Smith is Not Entitled to Qualified Immunity for His Violation of Ng's Sixth Amendment Right to Privately Meet with His Attorney

Applying, as it must, the qualified immunity standard articulated by the Supreme Court in *Pearson*, 129 S. Ct. at 808 and by the First Circuit in *Maldonado*, 568 F.3d at 269, this Court should deny Defendant's Motion based on qualified immunity regarding Smith's violation of Ng's Sixth Amendment right to meet privately with his attorney.

As stated earlier, Smith does not deny (Smith Dep. 143:4-11; 143:22-144:6; 146:10-17; 194:6-10; 194:14-18; 219:18-220:6) and Plaintiff has ample supporting evidence to show (Wong

[13] It almost goes without saying that a reasonable person would have offered to assist an immobile person to use bathroom facilities at some point during the more than 10 hours that Ng was with Smith. That Smith did not do so provides a knowing violation of the law articulated by *Ferola*, 622 F. Supp. at 822, and serves as one more reason why qualified immunity must be denied to Smith.

Dep. 60:16-19; 62:23-25) that on July 30, 2008, Smith forced Ng to speak to his attorney on a speaker phone in Smith's presence. Further, Smith became enraged when Ng conducted part of his conversation with Attorney Wong in Cantonese and screamed at him until Ng and his lawyer resumed speaking English (Wong Dep. 62:23-25; 82:3-6; 83:16-22.) As fully discussed at III,A,2 *infra*, these actions taken by Smith on July 30, 2008, deprived Ng of his Sixth Amendment right to meaningful and private consultation with his attorney. Therefore, the first prong of the qualified immunity test -- that Plaintiff has made out facts sufficient to show the violation of a constitutional right -- is met. *See Maldonado*, 568 F.3d at 269.

Similarly, Smith's actions on July 30, 2008, violated the second prong of the qualified immunity standard. By July 2008, ample authority existed both in and out of the First Circuit that a detainee's Sixth Amendment rights were violated when he was not allowed private telephone contact with his attorney. *See Simpson*, 231 F. Supp. 2d at 348 (defendant presented a cognizable sixth amendment claim where he was denied telephone access to his attorney while a detainee); *See also, Johnson El*, 878 F.2d at 1052 ("reasonable officials would recognize in light of existing law that ... phone restrictions ... and the lack of privacy for communications with attorneys ... are unconstitutional.). As such, the law was clear that detainees had the right to speak privately to their attorneys. Just as obvious, a reasonable person in Smith's position would have known this very basic tenet of the law governing prisoners' rights. Smith has worked with prisoners and/or detainees his entire career (Smith Dep. 22:22-24:21). It defies credulity to believe that someone in his position did not know that a detainee such as Ng had the constitutional right to speak to an attorney and had the further right to do so in privacy. Therefore, Smith knowingly violated a clearly-articulated law, establishing the second prong of

qualified immunity. *See Maldonado* at 269. In other words, Smith knowingly violated Ng's Sixth Amendment rights and is not entitled to the shield of qualified immunity as a result.

CONCLUSION

For each of the foregoing reasons, the Plaintiff respectfully requests that this Honorable Court DENY Defendant Smith's motion for summary judgment.

Dated: October 18, 2011

Respectfully submitted,

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CERTIFICATION

I hereby certify that a copy of the foregoing document was electronically served, to all Counsel of Record on this 18th day of October, 20011.

/s/ Fidelma L. Fitzpatrick