No. 20-1339

IN THE

# United States Court of Appeals

FOR THE SIXTH CIRCUIT

ANAS ELHADY,
*Plaintiff-Appellee,*
v.
UNIDENTIFIED CBP AGENTS;
MATTHEW PEW; JOSEPH PIRANEO; DANIEL BECKHAM;
TONYA LAPSLEY; NYREE IVERSON; WALTER KEHR;
SCOTT ROCKY; JASON FERGUSON
*Defendants*,
and
BLAKE BRADLEY,
*Defendant-Appellant.*

On Appeal from the United States District Court
for the Eastern District of Michigan

## BRIEF OF APPELLEE ANAS ELHADY

Date: May 7, 2021

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

# Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 20-1339 Case Name: Elhady v. Bradley

Name of counsel: Lena Masri, Gadeir Abbas, Justin Sadowsky

Pursuant to 6th Cir. R. 26.1, Anas Elhady
*Name of Party*
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

CERTIFICATE OF SERVICE

I certify that on May 7, 2021 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Lena Masri

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

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## STATEMENT OF ORAL ARGUMENT

Appellee does not request oral argument but are prepared to present oral argument at the Court's request.

## STATEMENT OF ISSUES

1. Did Bradley violate Elhady's constitutional rights when Bradley detained Elhady in a cell that was lower than 2.2°C (36°F), for 4.5 hours, refused him any blanket or jacket, even though those were available, until Elhady passed out from cold exposure and was found to have to have "decreased core temperature?"

2. Is it clearly established that Bradley could not detain Elhady in "severely cold" temperatures, as defined as freezing or near-freezing temperatures, without adequate clothing or protection, and without any penological justification?

## INTRODUCTION

Anas Elhady was a college student who just wanted to visit his friends in Canada for an evening. But when he came back, instead of being welcomed into his own country, he was locked in a freezing or near-freezing cell for four and a half hours. Instead of being interrogated in the "interview room" where the encounter would be video-recorded, Defendants questioned him repeatedly inside that unmonitored frigid cell. They took away his shoes and jacket, denied him a blanket, and otherwise ignored his strident pleas for warmth. After a few hours in these conditions, Elhady passed out from the cold and required hospitalization. He suffered from decreased core temperature, delayed capillary refill, and borderline-bradycardic heartrate.

Based on Elhady's core temperature, an expert in this case was able to work backwards to calculate the temperature of the cell Elhady was detained in as lower than 2.2°C (36°F), and possibly below freezing. No individual should be kept in such cold without adequate protection. Clearly established law already holds this.

So the way Bradley—the individual who controlled Elhady's detention and was responsible for the conditions of his confinement at the

border—treated Elhady was unconstitutional. And Bradley is not entitled to qualified immunity.

## STATEMENT OF THE CASE

Bradley's statement of the case fails to follow the standard of review and review all facts in the light most favorable to Elhady. *Nickels v. Grand Trunk W. R.R., Inc.*, 560 F.3d 426, 429 (6th Cir. 2009). Bradley also omits several important facts critical to the District Court's decision. As a result, Elhady provides the following brief counterstatement of the case.

### I. Bradley detains Elhady in freezing cold conditions.

On April 10, 2015, 22-year-old American college student Anas Elhady went to Canada to visit friends. Elhady Deposition, RE 98-2, PageID ## 1988-1989, 2015-2016; TECS Record, RE 27-1, PageID # 472. At 1:43 am the next day, on his return through the Ambassador Bridge Port of Entry, CBP officers handcuffed and arrested him. Elhady Deposition, RE 98-2, PageID ## 1989; 1991, 1994. There was no warrant for Elhady's arrest, no probable cause or reasonable suspicion that Elhady committed any crime, and no reason CBP or anyone else has ever provided for this arrest. CBP Deposition, RE 114-11, PageID # 4298. The

temperatures outside were somewhere between 36 and 43 degrees Fahrenheit. Climatology Data, RE 41-3, Page ID # 590 CBP officers confiscated his phone and demanded the passcode to his phone and Apple ID password. Elhady Deposition, RE 98-2, PageID ## 1994-1995; CBP Deposition, RE 114-11, PageID # 4293.

CBP officers then locked Elhady in a cold cement cell with no windows. Elhady Deposition, RE 98-2, PageID ## 1997-1998, 2001; Iverson Deposition, RE 99-5, PageID # 2195, (lighting always on). According to Elhady's expert, who was able to calculate the temperature of the cell working backwards from Elhady's medical records, the temperature of the cell was less than 2.2°C (36°F), and "possibly below freezing." Geisbrecht Report, RE 113-10, PageID # 3424; *see* Order and Opinion, RE 122, PageID # 4677.[1] As Dr. Geisbrecht explained, at these temperatures, a "[v]ictim is fully conscious, can sense cold and discomfort (except in frostbitten areas)." *Id.* The cold "increases shivering intensity to vigorous levels as core temperature decreases within this range; this is very

[1] Bradley's Statement of the Case only states (at 6) that Plaintiff's expert cell was "possibly below freezing" and goes on—without making any legal challenge to the Expert's finding—to suggest that Geisbrecht's analysis should be disregarded as unsupported.

uncomfortable." *Id.* Along with certain accessories, CBP removed Elhady's jacket and shoes, and left him in the cell with just his shirt, pants, and some thin socks. Elhady Deposition, RE 98-2, PageID # 1996. CBP knew, at minimum, that there were severe issues with the temperature of the facility and the detention cells in particular. CBP Deposition, RE 114-11, PageID ## 4308-4310, 4318; Iverson Deposition, RE 99-5, PageID ## 2190-2191; Piraneo Deposition, RE 100-3, PageID # 2367; Pew Deposition, RE 89-3, PageID # 1566. CBP would ultimately stop using these detention cells for this reason. CBP Deposition, RE 114-11, PageID ## 4309; 2018 HVAC Emails, RE 113-5, PageID ## 3365-3369. There were other places CBP could have placed him, at minimum during interrogations, as they had a warmer interview room where individuals are normally interrogated. Rocky Deposition, RE 98-3, PageID # 2035; Iverson Deposition, RE 99-5, PageID ## 2196, 2216; Palsley Deposition, RE 99-6, PageID # 2230.

CBP officers then kept him in the freezing cell for several hours. They interrogated him in his cell, asking him generalized questions about his background, as well as questions about terrorists, terrorist groups, and random Arabic names that Elhady had no knowledge about. Elhady

Deposition, RE 98-2, PageID ## 1999-2000; Amended Complaint, RE 27, PageID # 472. During this time, Officer Bradley—the Ambassador Bridge Port of Entry counter-terrorism response officer—supervised his detention. It was ultimately Officer Bradley who had the authority to continue to detain or release Elhady. MSJ of Jason Ferguson and Bradley, RE 101, PageID ## 2407-2408.

Elhady complained about the cold to the first officer who came by to question him. Elhady asked "Can I get my shoes and jacket back at least if they, you know, finished searching those?" The officer only responded with "you'll be out shortly." Elhady Deposition, RE 98-2, PageID # 1998.

Elhady continued to complain about the cold during questioning. He yelled through the door to get attention. Elhady felt that they were intentionally ignoring his complaints about the cold. Elhady's request for his shoes, a jacket, or a blanket continued to be ignored. Elhady Deposition, RE 98-2, PageID ## 2001-2003. CBP could have, but did not, offer Elhady his shoes or jacket, or blankets (which they keep onsite). Bradley Deposition II, RE 101-3, PageID # 2545; MSJ of Jason Ferguson and

Bradley, RE 101, PageID # 2462; Pew Deposition, RE 89-3, PageID # 1568 (same).[2]

Over time, Elhady felt his feet and then more of his lower body, including his thighs, go numb with cold. He was shaking a lot. He felt like he was dying. He believed he was being tortured. Elhady Deposition, RE 98-2, PageID ## 2004, 2006-2007, 2012, 2023. He tried calling out to a passing officer that he was freezing. But that officer ignored him. Elhady kept yelling "Help, I'm freezing. Can I please get help? It's really cold in here. Can anybody come here?" *Id.* at PageID ## 2003-2005, 2024. CBP ignored him. *Id.*

## II. Elhady passes out and requires hospitalization due to cold.

Ultimately, due to the cold and despite the bright lights, Elhady passed out. *Id.* at PageID ## 2006-2007.[3] Elhady was revived by two officers. *Id.* They set him on the metal seat in the cell, left him there for five minutes, then came back and escorted him in handcuffs to the main lobby. *Id.* The officers told him he was free to leave. *Id.* at PageID # 2008.

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[2] There was conflicting testimony about the availability of blankets. CBP Deposition, RE 114-11, PageID.4303 (blankets unavailable); Bradley Deposition, RE 101-3, PageID # 2554 (same).

[3] Bradley also failed to include this fact in his statement of the case.

At this point, Elhady had been detained in freezing conditions for approximately 4.5 hours.

Elhady requested to be taken to the hospital. *Id.* After 15-30 minutes, an ambulance arrived and took him to the hospital. *Id.*; TECS Record, RE 27-1, PageID # 472. The ambulance provided Elhady a blanket to warm him up. Elhady Deposition, RE 98-2, PageID ## 2009-2010; Hellner Deposition, RE 96-4, PageID # 1752; Hospital Billing Report, RE 96-3, PageID # 1749. Despite being previously told he was free to leave, CBP officers accompanied him to the hospital and handcuffed him to the bed. Rocky Deposition, RE 98-3, PageID # 2044; Kehr Deposition, RE 98-4, PageID # 2081.

Elhady had "delayed capillary refill," which "would corroborate the statement that the patient said that he was put in a freezer for four hours. And that he was cold." Hellner Deposition, RE 96-4, PageID ## 1756, 1758. A "delayed capillary refill …. can happen when a patient is cold or exposed to cold just like your hands would get white if you were not wearing gloves in the winter." Antoniolli Deposition, RE 101-12, PageID ## 2919-2920.[4] Elhady's coldness was also "consistent" with his

[4] Bradley also failed to include this fact in his statement of the case.

abnormally-slow (borderline- bradycardic) heart rate. Hellner Deposition, RE 96-4, PageID # 1756.

The ambulance did not measure Elhady's temperature. Still, even after the ambulance warmed him by giving him oxygen, raising the heat in the ambulance, and providing him blankets, Elhady's temperature (at 6:49 am) was still only 35.6 degrees Celsius, or 96 degrees Farenheit. Zani Deposition, RE 96-7, PageID # 1857. Medically known as "decreased core temperature," this is "subnormal", outside of the "reference range", and was flagged as low. *Id.*; Freeman Deposition, RE 96-9, PageID ## 1913-1914; Antoniolli Deposition, RE 101-12, PageID # 2907; Hospital Records, RE 96-5, PageID # 1796.

After Elhady was given a warm blanket and got some sleep[5], his temperature was taken again at 8:55 am. Zani Deposition, RE 96-7, PAgeID # 1861. His temperature had risen to 36.1 degrees Celsius (97 degrees Fahrenheit). *Id.* Elhady's treatment lasted about two hours. *Id.* at PageID # 1850. After that, he was discharged. Elhady Deposition, RE

[5] Bradley claims (at 7), against the standard of review, that Elhady was not treated for cold exposure, but warming via a warm blanket is the normal treatment for cold exposure of the type Elhady faced. Zani Deposition, RE 96-7, PageID # 1857.

98-2, PageID ## 2012-2014. Elhady returned to CBP (still handcuffed), where his items were returned to him and he was released. *Id.*; CBP Deposition, RE 114-11, PageID # 4303; TECS Record, RE 27-1, PageID # 472; Bradley Deposition, RE 101-3, PageID # 2568; Palsley Deposition, RE 99-6, PageID # 2243.

## III. Elhady sues and the District Court denies Bradley summary judg-ment.

Elhady sued Bradley and other officers in 2017 for his treatment under *Bivens,* alleging the detention violated Elhady's Fifth Amendment rights. PageID.1-7. Defendants moved to dismiss, arguing the lack of a *Bivens* remedy, but the Court denied the motion. MTD, RE 41, PageID # 552, MTD Decision, RE 46, PageID ## 670-689.

After discovery, Defendants moved for summary judgment. *See* Pew MSJ, RE 96, PageID.1663-1696; *see also* Bradley and Ferguson MSJ, RE 101, PageID ## 2408-2463. Although the District Court granted summary judgment as to other defendants for failure to sufficiently connect their conduct to the constitutional violation, the District Court denied summary judgment to Bradley. MSJ Decision, RE 122, PageID # 4663-4698.

As it relates to the Court's objective prong of Elhady's Fifth Amendment claim (the only issue Bradley appeals), the District Court found that, interpreting the facts in Elhady's favor, Elhady had shown the conditions Bradley had exposed Elhady to were constitutionally deficient. *Id.* at PageID ## 4681-4687. As the District Court explained, Elhady had a "right to be free from exposure to severe weather and temperatures." *Id.* at PageID ## 4682-4683; *see also id.* at Page ID # 4697. As the District Court explained by way of a journey through the parties' competing proffers of caselaw, Bradley violated this right. *Id.* at PageID ## 4681-4687.

The District Court also found that qualified immunity did not apply. *Id.* at PageID ## 4695-4698. The District Court rejected Bradley's argument that qualified immunity required a binding case finding a constitutional violation where defendants "allow a detainee to remain in a climate-controlled cell, in a climate-controlled building, for approximately four hours, when the detainee uses the colloquial expression that he is freezing." *Id.* at PageID # 4696.

Instead, the right at issue—as also found by another District Court in this Circuit—was the "right to be free from exposure to severe weather and temperatures." *Id.* at PageID # 4697 (citing *Burley v. Miller*, 241 F.

Supp. 3d 828, 839 (E.D. Mich. 2017)). This right was already clearly established in 2013, when the facts in *Burley* occurred. *Id*. So the right was also clearly established in 2015 when Bradley froze Elhady. *Id. Burley*, in turn, found this right established by, among other cases, *Hope v. Pelzer*, 536 U.S. 730, 737–38, (2002), and *Burchett v. Kiefer*, 310 F.3d 937 (6th Cir. 2002). *Burley*, 241 F. Supp. 3d at 837.

Bradley now appeals.

## SUMMARY OF ARGUMENT

Bradley violated Elhady's rights by placing him in a cell that was lower than 2.2°C (36°F), for 4.5 hours, refusing him any blanket or jacket even though those were available, until Elhady passed out from cold exposure, suffering decreased core temperatures, delayed capillary refill, and a borderline-bradycardic heartrate.

Based on clearly established law, it is unconstitutional under the Fifth and Eighth Amendments to (1) detain someone in freezing or near freezing conditions (2) without adequate protection from the cold, particularly until (3) that person suffers injury, (4) absent penological justification.

Here, Bradley has no justification for detaining Elhady at all, much less under these conditions. Nor does Bradley have any justification for refusing Elhady a blanket, his jacket, or his shoes. Bradley is not entitled to qualified immunity.

## ARGUMENT

### I. Bradley violated clearly established law by placing him in a freezing cold cell without adequate protection or penological justification.

#### A. The Fifth Amendment prohibits placement in severely cold temperatures without penological justification without adequate protection.

"[T]he unnecessary and wanton infliction of pain ... constitutes cruel and unusual punishment forbidden" by the Constitution. *Whitley v. Albers*, 475 U.S. 312, 319 (1986) (cleaned up). "Among 'unnecessary and wanton' inflictions of pain are those that are 'totally without penological justification.'" *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981); *see also Turner v. Safley*, 482 U.S. 78, 87 (1987) (explaining basis for "penological justification" component).

In *Hope v. Pelzer*, the Supreme Court declared that "unnecessary exposure to the heat of the sun" qualifies and violates this constitutional right. 536 U.S. at 738. In *Burchett v. Kiefer*, the Sixth Circuit affirmed

that "unnecessary detention in extreme temperatures" violates the Constitution. 310 F.3d at 945.

This naturally includes extreme (or severe) cold. "Severe cold" is defined as any temperature "sufficiently cold to cause extreme discomfort," *Burley*, F. Supp. 3d at 838 (quoting *Wright v. McMann*, 460 F.2d 126, 129 (2d Cir. 1972)); *Del Raine v. Williford*, 32 F.3d 1024, 1033 (7th Cir. 1994) (same); *Chandler v. Baird*, 926 F.2d 1057, 1065 (11th Cir. 1991) (same). So this Circuit has confirmed unambiguously that the constitution is "violated when prison officials let the cold inside, exposing inadequately protected inmates." *Spencer v. Bouchard*, 449 F.3d 721, 728 (6th Cir. 2006). Similarly, while the Supreme Court has itself asserted that while a "prison boiler malfunction[ing] accidentally during a cold winter" does not provide a "basis for an Eighth Amendment claim," *Wilson v. Seiter*, 501 U.S. 294, 300 (1991), the reason for the lack of a claim is solely due to the subjective prong of the Eighth Amendment, which is not at issue in this case and not part of the Fifth Amendment analysis anyway. *See* § II, below. And in an unpublished opinion, this Court confirmed that if a prison "exposed [a plaintiff] to temperatures that were close to freezing and failed to provide him adequate clothing and

blankets," that would violate the Eighth Amendment. *Franklin v. Franklin*, 215 F.3d 1326 (6th Cir. 2000) (unpublished).

So too here.

The evidence, viewed most favorably to Elhady, establishes that the temperature he was held at was less than 36 degrees Fahrenheit, and thus at freezing or near freezing. CBP Deposition, RE 113-10, PageID # 3423; MSJ Decision, RE 122, PageID # 4677. The evidence also shows that Elhady not only suffered extreme discomfort but suffered medically-cognizable harm—decreased core temperature, delayed capillary refill, and borderline-bradycardic heartrate. Hellner Deposition, RE 96-4, PageID. ## 1756, 1758; Zani Deposition, RE 96-7, PageID # 1857; Freeman Deposition, RE 96-9, PageID ## 1913-1914; Antoniolli Deposition, RE 101-12, PageID # 2907; Hospital Records, RE 96-5, PageID.1795.

His limbs went numb, and he passed out from the cold. Elhady Deposition, RE 98-2, PageID II 2004, 2006-2007, 2012, 2023. And Elhady warned Bradley and other officers that he was physically suffering as a result of the conditions of confinement, asking for his shoes, his jacket, and a blanket. *Id.* at PageID ## 1998, 2001-2005, 2024. Still, Bradley and his team did nothing.

Instead, Bradley prolonged his exposure to the cold by interrogating him inside the cold cell rather than the interview room. Rocky Deposition, RE 98-3, PageID # 2036; Iverson Deposition, RE 99-5, PageID ## 2196, 2216; Palsley Deposition, RE 99-6, PageID # 2230. And Bradley did nothing to address these cold conditions, even though he could have provided Elhady, at minimum, the requested shoes, jacket, and blanket. Bradley Deposition, RE 101-3, PageID # 2545; Ferguson Deposition, RE 101-2, PageID # 2462 (blankets were available); Pew Deposition, RE 89-3, PageID # 1568. (same).

This conduct violates the constitution under *Hope*, *Burchett*, *Spencer*, and *Franklin*. Similarly, other courts have found that temperatures of "near[-]freezing" is sufficient. *E.g., Andrich v. Dusek*, 17-cv-173, 2018 WL 3633739, at *4 (D. Ariz. July 31, 2018). Likewise, "[f]rostbite, hypothermia, or a similar infliction" is not required to show a violation." *Del Raine v. Williford*, 32 F.3d 1024, 1035 (7th Cir. 1994).

In every case Elhady is aware of where an incarceree was able to show some sort of extreme discomfort due to temperatures they could establish as at or near freezing, without proper attire, the Court found such conditions improper absent some penological justification. *See, e.g.,*

*Gillespie v. Civiletti*, 629 F.2d 637, 642 (9th Cir. 1980) ("allowed him to be placed in an isolation cell … which temperatures reached near freezing during the night"); *Smith v. Allbaugh*, 16-cv-654, 2018 WL 4402968, at *8 (W.D. Okla. Apr. 30, 2018) ("detained outside for five hours, for no legitimate purpose, in freezing or near-freezing temperatures without a coat or blanket"), *report and recommendation adopted*, 2018 WL 2966945 (W.D. Okla. June 13, 2018).

And in every case Bradley cites both here and in the District Court where conditions were deemed constitutionally sufficient, the plaintiff in question was unable to establish that they were suffering extreme discomfort or that they were exposed to temperatures that were at or near freezing without proper attire. *See Dean v. Campbell*, 156 F.3d 1229, 1998 WL 466137, at *2 (6th Cir. 1998) (unpublished) (factually unsupported allegation the cell was "cold" insufficient); *Strope v. McKune*, 382 Fed. App'x 705, 708 (10th Cir. 2010) (unpublished) (plaintiff failed to show cells were inadequately warm given inmates were able to have extra clothing and blankets); *Wallace v. Davis*, 17-cv-05488, 2019 WL 652889, at *5 (N.D. Cal. Feb. 15, 2019) ("no evidence that he was not dressed for the weather"); *Palmer v. Abdalla*, 11-cv-503, 2012 WL

4473206, at *5 (S.D. Ohio Sept. 4, 2012) (no evidence of temperature of cell, and prisoner suffered no adverse effects other than a cold and some "temporary numbness" in his hands); *Van Williams v. Cook County, Georgia*, 3-cv-120 WL, 2006 WL 2444065, at *6 (M.D. Ga. Aug. 22, 2006) (plaintiff had no evidence of temperature in cell, and the evidence merely showed "nighttime [outdoor] temperatures only reaching into the 30's and some form of heating system operating in the jail"); *see also* MSJ Opposition, RE 112, Page ## 3276-78; MSJ Opinion, RE 122, PageID # 4697 (citing cases).

Indeed, the clarity of the line delineating the unconstitutional conduct is remarkably clearly established. *Ohio Civ. Serv. Employees Ass'n v. Seiter*, 858 F.2d 1171, 1177 (6th Cir. 1988) (noting that even nonbinding precedents may make a rule clearly established for qualified immunity purposes when they "unmistakably" show conduct is unconstitutional); *see also* § C (qualified immunity analysis), below.

Bradley (at 22-23) describes temperatures that appear to be freezing or near freezing in his brief in cases where Bradley claims no constitutional violation was found. But in every one of those cases, the only temperatures that incarcerees could establish were the outside

temperatures rather than the temperatures in the cell where the incarceree complained that the conditions of confinement occurred. *Palmer*, 2012 WL 4473206, at * 5 ("it is difficult to know to what degree the outside temperature affected the temperature of the cell"); *Van Williams*. 2006 WL 2444065, at *6 ("this is not a case in which temperatures inside the plaintiff's cell were shown to be below freezing") *Strope*, 382 F. App'x at 708 ("these are outside temperatures, which are obviously of limited relevance").

Bradley complains throughout that at least some other cases were for longer periods of time than 4.5 hours, and suggest those cases imply keeping an underdressed individual in freezing temperatures overnight for a mere 4.5 hours until they require hospitalization is okay. But as *Spencer* notes, the additional length of those cases were cited as a reason to compensate for the lack of evidence regarding freezing or near-freezing temperatures: "[E]ven 'modest deprivations can ... form the objective basis of a violation ... if such deprivations are lengthy or ongoing.'" 449 F.3d at 729 (quoting *Johnson v. Lewis*, 217 F.3d 726, 732 (9th Cir. 2000)). So in *Spencer*, "any doubts about the severity of the cold in the instant case are compensated by the duration of Spencer's exposure to it." *Id*. Here,

there are no doubts about the freezing or near-freezing temperatures, given the expert testimony and the summary judgment standard.

In an attempt to support this misreading of the law, Bradley also cites (at 21-22) to *Hadix v. Johnson*, 367 F.3d 513, 528-29 (6th Cir. 2004), a case about fire safety, to claim that there is a "continuum" between merely "uncomfortable versus unconstitutional." But even a cursory review of that "continuum" of cases shows a straightforward dichotomy. Merely technical violations of a fire code would not be considered a constitutional violation, but those fire safety issues that did pose a serious risk to the health and safety of incarcerees would, even without any proof of consequent harm. *Id.* Here, Elhady is not relying on a mere violation of some regulation. If he were, all he would need to show is that the temperature of the cell was below the regulation-required 66 degrees. *See* 2015 & 2018 HVAC Emails, RE 99-7, PageID ## 2262-2286. Elhady instead shows the detention cells were kept at actual freezing (or near freezing) temperatures, which—as case after case along with common sense shows—poses a serious risk to the health and safety of individuals not adequately dressed for such temperatures.

Bradley also cites (at 22-23) a handful of non-Sixth Circuit cases. In doing so, Bradley misrepresents the holding in *Trammell v. Keane*, 338 F.3d 155, 165 (2d Cir. 2003). Bradley argues *Trammell* held that the Court there found no constitutional violation despite the conditions being "bitter cold." And yet this is almost the exact opposite of what the *Trammell* Court found: "Trammell's complaint and his statement submitted in satisfaction of Local Rule 56.1 are ***devoid of any allegations*** that the cell in which he was housed was open to the elements, that it lacked adequate heat, or, as he contends for the first time on appeal, that the cell was 'bitter cold.'" *Id.* at 165 (emphasis added). It was these failures of allegations that distinguished *Trammell* from the cases the plaintiff there relied on. *Id.*

Bradley also claims (at 23) that *Wells v. Jefferson Conty, Sheriff*, 35 F. App'x 142, 143 (6th Cir. 2002) (unpublished), found "no constitutional violation" when an incarceree was stuck in a "cold cell." But in that case the incarceree clarified that he "did not intend to raise these allegations as a separate claim" from his failure to protect and inadequate medical care claim arising out of a fight. *Id.* And so the Court made nothing of it

other than noting that the nondescript allegation alone "does not rise to the level of a constitutional violation." *Id.* *Wells* is irrelevant.

Bradley also complains (at 27) that "the district court improperly disregarded several decisions in which other district courts rejected claims for constitutional violations based on cold cell conditions, on the basis that plaintiff here provided evidence of his body temperature." This mischaracterizes what the District Court found. The District Court found Elhady's temperature critical because Elhady's expert was able to take Elhady's body temperature and establish that the temperature of the cell was near freezing or freezing. *See* MSJ Decision, RE 122, PageID ## 4683-4684 ("the most significant input in Giesbrecht's model is Elhady's temperature reading of 35.6 degrees Celsius, and he does not dispute the method by which Giesbrecht converts inputs (Elhady's temperature, Elhady's self-described symptoms) into outputs (the cell's temperature)"). And, as mentioned above, as well as in Elhady's brief below, that fact alone distinguishes Bradley's whole line of cases claiming a lack of a constitutional violation. MSJ Opposition, RE 112, PageID ## 3276-3278 (stringcite).

The only possible exception is *Mena v. City of New York,* 12-cv-28, 2014 WL 2968513 (S.D.N.Y. June 27, 2014). In *Mena*, the "inside ambient temperature" complained of was 68.3 degrees, *id.* at *3, but the Court stated in dicta that "Courts require exposure to below freezing temperature for at least weeks at a time to prevail on an Eighth Amendment Claim." *Id.* at *9. The four cases the Court relied on for this proposition were *Gaston v. Coughlin*, 249 F.3d 156, 165 (2d Cir. 2001), *Corselli v. Coughlin*, 842 F.2d 23, 27 (2d Cir. 1988), *Wright v. McMann*, 387 F.2d 519, 526 (2d Cir. 1967), each of which merely found that such conditions were sufficient, not necessary, to state an Eighth Amendment claim, and *Trammel*, which as discussed above, was decided on the lack of allegations of coldness below. As the District Court explained, *Mena* "is a severe overstatement of the Second Circuit's Eighth Amendment law" and "is inconsistent with the caselaw within our Circuit." MSJ Decision, RE 122, PageID # 4687. So *Mena* does not render the District Court's denial of summary judgment improper.

Bradley concludes his no-violation defense by simply minimizing the facts. According to Bradley (at 26-27), "Plaintiff was detained indoors for approximately four hours, with his clothing (except his jacket and

shoes), and he did not describe any particular conditions that would have exacerbated his susceptibility to colder temperatures." And "plaintiff was not treated for exposure to the cold." *Id.* Bradley would have this Court believe this is a case about unsubstantiated allegations of cold that caused Elhady no harm at all.

But that is contrary to the record and the summary judgment standard. Instead, as Elhady's Statement of Facts based on the facts most favorable to Elhady—the nonmovant—show, Elhady was detained in a cell with a temperature that was lower than 2.2°C (36°F), for 4.5 hours, refused any blanket or jacket even though those were available, deprived of his shoes, passed out from cold exposure, and then taken to the hospital via ambulance, where he was found to have a "decreased core temperature." Maybe Bradley can dispute some of these facts at trial, and prove that Elhady's temperature, delayed capillary refill, and lowered heartrate was some sort of coincidental medical aberration. But summary judgment remains inappropriate.

### B. There was no penological justification for Bradley's actions.

By keeping Elhady in freezing or near-freezing temperatures without adequate protection from the cold, Bradley violated Elhady's constitutional rights unless he had sufficient "penological justification" for his actions. *Hope*, 536 U.S. at 737; *Burley*, 241 F. Supp. 3d at 838; MTD Decision, RE 46, PageID # 678. Here, Bradley has no penological justification for detaining him at all, much less in a cold cell. Elhady has proven this in a way far more straightforward than in any other case, as Bradley has provided no justification at all for his actions. Unlike the many other prison cases, where the Government had sentenced the victim and thus had an obligation to keep them incarcerated, Bradley had no grounds for his detention at all. He cites no probable cause for holding him, or even reasonable suspicion. There is nothing in the record to indicate that Bradley was required or even had any good reason to detain him in the first place. And they offered to release him contemporaneously with him asking for medical attention. Elhady Deposition, RE 98-2, PageID # 2008. Thus, Bradley could have declined to detain Elhady overnight in a freezing cell. But he did so anyway. So Bradley cannot show penological justification for his actions.

Nor does Bradley provide any justification for detaining Bradley in a more appropriate room, or refusing to provide Bradley the shoes, jacket, or blanket that Elhady asked for. So even if Bradley could show penological justification for the detention, he cannot show penological justification for the conditions or the failure to provide Elhady protection from those conditions.

The District Court found as much: "In *Trevino v. Jones*, No. 06-cv-0257, 2007 WL 710213, at *6-7 (N.D. Okla. Mar. 6, 2007), the court denied the Eighth Amendment claim, leaning on the 'exigencies of running a prison,' and the 'restrictive and even harsh' conditions officers may impose on prisoners without violating the Eighth Amendment. Nothing comparable excuses the allegedly harsh conditions in this case." PageID.4685.

Bradley cites (at 23) *Willis v. Barksdale*, 625 F. Supp. 411, 416–17 (W.D. Tenn. 1985) (an excess heat, not cold, case), as a case where no improper conditions were found. But *Willis* turned on the presence of a penological justification. In *Willis*, the court found that the Government did what it could do to mitigate the impact of an unusually intense heatwave that led to a (susceptible to heat) incarceree's death. *Id.* The prison

"made sure that inmates had access to medical attention for heat-related problems, that inmates were aware of symptoms of such problems, that additional salt and ice water were available, that the fans were in place and in operation, [and] the medical department had elderly inmates moved to a cooler area." *Id.* at 414.

Here, Bradley has no similar penological justification defense. Bradley could have given Elhady a blanket, his jacket and shoes back, or moved him to a warmer room. These are all steps that Bradley could have taken to mitigate the impact to Elhady when the temperature in his cell was freezing. And while the incarceree in *Williams* was sentenced to prison, Elhady was sentenced to nothing at all. Bradley could have let him go at any time. As a United States citizen, Elhady had an absolute right to enter the country. And there is no claim of even reasonable suspicion to have detained him in the first place.

### C. Bradley's violation was clearly established.[6]

When assessing the clarity with which the constitutional right was established at the time of the officers' conduct, courts must guard against defining the right too broadly. *Saucier v, Katz*, 533 U.S. 194, 201 (2001) (emphasizing that "[t]his inquiry ... must be undertaken in light of the specific context of the case, not as a broad general proposition"). On the other hand, there need not be "a case directly on point, [as long as] existing precedent [has] placed the statutory or constitutional question beyond debate." *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011). "If it defeats the qualified-immunity analysis to define the right too broadly (as the right to be free of excessive force), it defeats the purpose of § 1983 to define the right too narrowly (as the right to be free of needless assaults by left-handed police officers during Tuesday siestas)." *Hagans v. Franklin County Sheriff's Off.*, 695 F.3d 505, 508–09 (6th Cir. 2012). More on left-handed Tuesday siestas later.

[6] While Supreme Court and circuit precedent at the time of filing establishes qualified immunity as an available defense, Elhady hereby preserves his argument that the Supreme Court should revisit whether qualified immunity is an available defense in constitutional claims for monetary damages.

In finding the sweet spot, the Court must take into account that "a right can be clearly established even if there is no case involving 'fundamentally similar' or 'materially similar' facts." *Burchett v. Kiefer*, 310 F.3d 937, 945 (6th Cir. 2002) (citing *Hope v. Pelzer*, 536 U.S. 730, 741 (2002)). Instead, when "the reasoning, though not the holding, of a prior court of appeals decision puts law enforcement officials on notice, or when the premise of one case has clear applicability to a subsequent set of facts," the case clearly establishes a violation for the latter set of facts. *Id.* (citing *Hope*, 536 U.S. at 743) (cleaned up). So "an action's unlawfulness can be apparent from direct holdings, specific examples described as prohibited, or from the general reasoning that a court employs." *Id.*

This Court has made it clearly established that the Constitution is "violated when prison officials let the cold inside, exposing inadequately protected inmates." *Spencer v. Bouchard*, 449 F.3d 721, 728 (6th Cir. 2006). As explained by the district court in *Burley*, "there is a clearly established right to be free from exposure to extreme temperatures by prison officials." *Burley*, 241 F. Supp. 3d at 837. And, as discussed above in Section A, the universal holdings of cases outside this Circuit only confirm that it is unconstitutional to detain an individual like Elhady for no

reason at all in temperatures at or below 36 degrees, refusing him blankets or warm clothes, until he passes out from the cold and requires hospitalization. No reasonable law enforcement official could think freezing a person to the point of hospitalization, without adequate protection from the elements, ignoring his pleas in the meantime, would be constitutionally appropriate.

Bradley attempts to define the qualified immunity test by yet again mischaracterizing the facts of this case. According to Bradley (who, without explanation, asks this Court solely to look at "the facts as plaintiff testified as his deposition," as if this was Elhady's only support in the record), the question is whether it was clearly established that a detainee has a "right to remain free from cold conditions while detained indoors for a relatively brief period of time." Brief of Appellant at 29. Of course not. Elhady is not even arguing that it is unconstitutional to detain an individual in merely "cold" conditions for a "relatively brief period of time," without more. If that were all that Elhady could establish, then sure, the District Court's summary judgment denial was improper.

But Elhady instead has established that Bradley kept him in "severely cold" temperatures, as defined as freezing or near-freezing

temperatures, without adequate clothing or protection, and without any penological justification. And the principle that such freezing of detainees has been established as unconstitutional not just by common sense, but by the clear reasoning of *Franklin*, *Spencer*, *Burchett* and *Hope*, as well as by all the other cases throughout the country that confirm you cannot freeze someone to the point of hospitalization without good reason. *See generally* § A, above.

Bradley then goes on (at 36) to argue that qualified immunity should not be granted because none of the prior cases that banned freezing an inmate did so, as *Hagans* put it, at the hands of "left-handed police officers during Tuesday siestas." 695 F.3d at 508. He quibbles that there are no cases that involve the "particularized context" of a "border inspection" with "most of his clothing," and with the severe temperatures occurring indoors rather than caused by "extreme, outside elements" alone.[7]

[7] The distinction between indoor and outdoor does not reveal itself as important in any binding precedent, and to the extent there is any distinction, the difference between indoor and outdoor appears to be a mundane issue of proof. For outdoor cases, the weather report shows the temperature. In most indoor cases, the plaintiff cannot establish objectively the indoor temperature. As shown above and in the cases cited at Elhady's MSJ Opposition, RE 112, PageID ## 3276-3278, in indoor cases, it is difficult for plaintiffs (and particularly pro se plaintiffs) to show the indoor

But Elhady need not find such a white whale to vindicate his constitutional rights. The reasoning of the clearly established caselaw prohibits the government from keeping a plaintiff at freezing or near freezing conditions without adequate clothing for any significant length of time. It particularly prohibits freezing an individual for enough time that the individual, with no particular health issues, suffers from medically-diagnosable decreased core temperatures, passes out, and requires hospitalization.

Bradley further cites *Spencer* for the proposition that a cold case must involve the same "circumstances, nature, and duration." Brief of Appellant at 37. *Spencer* said no such thing. *Spencer* only asserted that "circumstances, nature, and duration" were relevant, citing the Ninth Circuit case in *Johnson*, as part of explaining the general principle that Eighth Amendment conditions of confinement tests often must balance facts. 449 F.3d at 728 (citing *Johnson*, 217 F.3d at 732). As a qualified immunity test, requiring each test to turn on the exact circumstances,

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cell's ambient temperature as near or below freezing. Here, and only thanks to the unusual ability of a plaintiff to afford an expert in a conditions-of-confinement case, Elhady can show how cold his cell was.

nature, and duration would render all cold cases covered by qualified immunity, in violation of *Hagans*.

In any event, *Spencer's*, "circumstances, nature, and duration" had nothing to do with qualified immunity. Instead, *Spencer* later clarifies its point and its citation to *Johnson*. *Spencer* explains that while sufficiently cold conditions "combined with a failure to issue blankets" may violate the constitution regardless of length of time, "even modest deprivations can ... form the objective basis of a violation ... if such deprivations are lengthy or ongoing." *Id.* at 729 (quoting *Johnson*, 217 F.3d at 731). So in *Spencer*, "any doubts about the severity of the cold in the instant case are compensated by the duration of Spencer's exposure to it." *Id.*

In sum, the reasoning of *Spencer* clearly establishes that when there are no doubts that the temperature was severe (and there are none here, given the standard of review), a lengthy duration is not needed. And even if a fleeting duration of freezing an individual might be permissible, no reasonable officer would think that freezing the individual for an amount of time long enough to make a healthy person medically sick and require hospitalization might be okay.

Yet Bradley suggests (at 26-27) that the fact that conditions were so cold that Elhady fell seriously ill despite having no obvious particular sensitivity to the cold works in Bradley's favor. According to Bradley, it was Burley's susceptibility to cold that made freezing him until he got sick so bad. But here Bradley froze Elhady until he got sick even though Elhady was healthy and so the malevolent task was harder. That does not make it better. It makes it ***worse.***

Bradley complains (at 37) there was no "fair and clear warning" that he could not keep Elhady in a literally freezing (or very near freezing) cell without proper clothing until he got sick. Apparently common sense does not provide the clear warning. But even if it did not, *Spencer*, *Franklin*, *Hope*, and *Burchett* all should have.

Bradley (at 35) also faults the District Court for relying on *Burley v. Miller*, 241 F. Supp. 3d 828 (E.D. Mich. 2017). But *Burley* did not clearly establish the law in question, and the District Court did not claim otherwise. *Burley*, instead, was a case specifically about qualified immunity. *Id.* at 833 & 835. There, through a discussion of much of the same cases Elhady cites above, the District Court correctly held that the plaintiff "has shown that the right to be free from exposure to severe weather

and temperatures was clearly established at the time of the incident alleged in the complaint." *Id.* at 839. There, like here, the Court also correctly explained that while the clearly established test cannot be viewed at too high a level of generality, it cannot be done at too narrowly a generality either. *Id.* at 836. And so here, the District Court was able to clearly note that Elhady's rights were already clearly established as early as 2013, when the facts in *Burley* occurred. MSJ Decision, RE 122, PageID # 4697.

*Bradley* also suggests that the facts of *Burley* are somehow more severe than the facts were here. Brief of Appellant at 36. This is incorrect. In *Burley*, Burley was only forced to stand in freezing cold conditions (albeit in rain, though this indicates the temperature was above freezing) for 10 to 12 minutes. *Id.* at 838. Then Burley was kept in wet clothing indoors for another two hours. *Id.* Here, Elhady was forced to be in freezing cold conditions and in inadequate clothes for 4.5 hours (and perhaps it would have been longer had he not passed out). Against that, there was no water involved. Both were enough to get the plaintiff in the case sick, with the only difference there being that Burley was predisposed to cold sickness and Elhady was not. *Id.* at 838-39. The conditions Elhady faced

appear more severe; at most the facts are slightly different. The only real fact suggesting *Burley* faced more extreme conditions was the rain and the wet clothing at issue there. But nowhere does the Court in *Burley* focus or rely on wetness in its reasoning. After all, none of the cases *Burley* (a qualified immunity case) relied on involved wetness either. And the difference in facts in the two cases only goes to show how requiring a precise set of facts on all fours is tantamount to excusing any cold-conditions violation outright.

## II. Bradley concedes any subjective prong that might apply to Bradley's constitutional violation.

Under the Eighth Amendment, constitutional violations require both an objective and a subjective element. But under the Fifth Amendment as applicable to Elhady, there is only an objective prong. *Kingsley v. Hendrickson*, 576 U.S. 389 (2015) (no subjective prong to Fifth Amendment claims); *Castro v. Cty. of Los Angeles*, 833 F.3d 1060, 1070 (9th Cir. 2016) (en banc) (applying *Kingsley* to deliberate indifference claims brought by pretrial detainees); *Darnell v. Pineiro*, 849 F.3d 17, 35 (2d Cir. 2017) (same); *Miranda v. Cty. of Lake*, 900 F.3d 335, 351–52 (7th Cir. 2018) (same); *but see Cameron v. Bouchard*, 815 F. App'x 978, 984 (6th Cir. 2020) (unpublished) (noting split of authority and that question

remains open in the Sixth Circuit). While the District Court in this case incorrectly found Elhady needed to show that Bradley also violated the Eighth Amendment subjective prong, the District Court also found Elhady met this purported requirement, and Bradley does not appeal this finding. So, even were a subjective prong required, Elhady has met that requirement for the purpose of this appeal.

## CONCLUSION

The Court should affirm the District Court's denial of summary judgment and remand the case for trial. In doing so, the Court may choose to instruct the District Court of the lack of a subjective prong so as to avoid legal error at trial and the potential need for further appeals.

Respectfully submitted,

Date: May 7, 2021

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## CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that: This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 7,255 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface, Century Schoolbook, using Microsoft Office's Word 2019, in 14-point font.

Date: May 7, 2021

*/s/ Lena Masri*
Lena F. Masri

## CERTIFICATE OF SERVICE

I hereby certify that on the date below, I caused to be electronically filed Appellee's Brief with the Clerk of the Court using the CM/ECF system which will send notification to opposing counsel.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

EXECUTED this 7th day of May 2021.

*/s/ Lena Masri*
Lena F. Masr

## DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Pursuant to Sixth Circuit Rule 28(b)(1)(A)(i), the government designates the following district court documents as relevant:

| Record Entry | Description | Page ID # Range |
|---|---|---|
| RE 1 | Complaint | 1-9 |
| RE 27-1 | TECS Record | 472 |
| RE 41 | Defendants' Motion to Dismiss | 552-590 |
| RE 41-3 | Climatology Report | 590 |
| RE 46 | Order Denying Defendants' MTD | 678 |
| RE 89-3 | Deposition of Matthew Pew | 1566-1568 |
| RE 96 | Defendant Matthew Pew's MSJ | 1663-1696 |
| RE 96-3 | Hospital Billing Report | 1749 |
| RE 96-4 | Deposition of Jessica Hellner | 1752, 1758 |
| RE 96-5 | Hospital Records | 1796 |
| RE 96-7 | Deposition of Ariana Zani | 1857, 1861 |
| RE 96-9 | Deposition of Scott B. Freeman | 1913-1914 |
| RE 98-2 | Deposition of Plaintiff Anas Elhady | 1988-2024 |
| RE 98-3 | Deposition of Scott Rocky | 2036-2044 |
| RE 98-4 | Deposition of Walter Brian Kehr | 2081 |
| RE 99-5 | Deposition of Nyree Iverson | 2195-2216 |
| RE 99-6 | Deposition of Tonya Palsley | 2230-2256 |
| RE 99-7 | 2015 & 2018 HVAC Emails | 2262-2286 |
| RE 100-3 | Deposition of Joseph Piraneo | 2367 |
| RE 101 | MSJ of Jason Ferguson and Bradley | 2408-2463 |
| RE 101-2 | Deposition of Jason Ferguson | 2462 |
| RE 101-3 | Deposition of Blake Bradley | 2545-2568 |

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| RE 101-12 | Deposition of Michael Antoniolli | 2907-2920 |
| RE 112 | Plaintiff's Omnibus Opposition to Defendants' MSJ | 3276-3278 |
| RE 113-5 | 2018 HVAC Emails | 3365-3369 |
| RE 113-10 | Expert Report of Gordon Giesbrecht, Ph.D. | 3424 |
| RE 114-11 | Deposition of Nicholas Sosnowski, CBP Corporate Designee | 4293-4318 |
| RE 122 | Order and Opinion Granting and Denying in Part Motion for Summary Judgment | 4663-4698 |